Before the

Federal Communications Commission

Washington, DC 20554

In re Applications of:

LITTLE ROCK HISPANIC EDUCATION FAMILY FUNDATION	)	File No. BNPL- 20131114AQI Facility No. 196053
BAKERSFIELD HISPANIC EDUCATION FAMILY FUNDATION	)	File No. BNPL- 20131114AWA Facility No. 196038
SOUTH OMAHA HISPANIC EDUCATION FAMILY FUNDATION	)	File No. BNPL- 20131115AOZ Facility No. 197574
SOUTH LAWTON HISPANIC EDUCATION FAMILY FUNDATION	)	File No. BNPL- 20131115AGJ Facility No. 197539
SOUTH EL PASO HISPANIC EDUCATION FAMILY FUNDATION	)	File No. BNPL- 20131115AEU Facility No. 196408
NORTH EAGLE PASS HISPANIC EDUCATION FAMILY FUNDATION	)	File No. BNPL-20131115AEX Facility No. 196423
SOUTH CORPUS CHRISTI HISPANIC EDUCATION FAMILY FUNDATION	)	File No. BNPL- 20131115AFE Facility No. 197525
NORTH LAREDO HISPANIC EDUCATION FAMILY FUNDATION	)	File No. BNPL- 20131115AFH Facility No. 196431
NORTH ODESSA HISPANIC EDUCATION FAMILY FUNDATION	)	File No. BNPL- 20131115AFV Facility No. 197531
NORTH VICTORIS HISPANIC EDUCATION FAMILY FUNDATION	)	File No. BNPL- 20131115AGD Facility No. 197536
NORTH AMARILLO HISPANIC EDUCATION FAMILY FUNDATION	)	File No. BNPL- 20131115AGF Facility No. 197535
SOUTH BROWNSVILLE HISPANIC EDUCATION FAMILY FUNDATION	)	File No. BNPL-20131115AGN Facility No. 197545
SOUTH TYLER HISPANIC EDUCATION FAMILY FUNDATION	)	File No. BNPL- 20131114AQI Facility No. 197547

HAZLER HISPANIC COMMUNITY RADIO	)	File No. BNPL- 20131112AGC
	)	Facility No. 194082
	)	
NORFOLK COMMUNITY RADIO	)	File No. BNPL- 20131112AGS
	)	Facility No. 194526
	)	
PITTSBURGH COMMUNITY RADIO FAMILY FUNDATION	)	File No. BNPL- 20131112AGS
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SALT LAKE CITY COMMUNITY RADIO FAMILY FUNDATION	)	File No. BNPL- 20131112ALQ
	)	Facility No. 194566
	)	
ABILENE HISPANIC COMMUNITY RADIO EDUCATION FAMILY FUNDATION	)	File No. BNPL-20131114AOX
	)	Facility No. 195643
	)	
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	)	Facility No. 195642
	)	
WICHITA FALLS CESAR CHAVEZ FOUNDATION	)	File No. BNPL- 20131114APE
	)	Facility No. 195680
	)	
TEMPLE OF POWER	)	File No. BNPL- 20131112ASB
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	)	
BALCH SPRINGS RADIO DE LA COMMUNIDAD	)	File No. BNPL- 20131112ACT
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NORTH FORT WORTH HISPANIC COMMUNTY CHURCH	)	File No. BNPL-20131112AGY
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	)	)
CADENA RADIAL REMAMENTE	)	File No. BNPL- 20131113ABE
	)	Facility No. 195343
	)	
CADENA RADIAL MISION Y VISION FAMILY FUNDATION	)	File No. BNPL- 20131113ABF
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	)	
LAREDO HISPANIC COMMUNITY CHURCH EDUCATION FAMILY FUNDATION	)	File No. BNPL-20131114BUD
	)	Facility No. 196849
	)	
FUNACION ESPERANZA VIVA	)	File No. BNPL- 20131115ALQ
	)	Facility No. 197143
NORTH SAN ANTONIO COMMUNITY	)	File No. BNPL- 20131112AHO

RADIO FOUNDATION	)	Facility No. 194556
	)	
SOUTH MCALLEN HISPANIC EDUCATION FAMILY FUNDATION	)	File No. BNPL- 20131113AFM
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SOUTH JACKSONVILLE COMMUNITY RADIO	)	File No. BNPL- 20131112BDZ
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	)	Facility No. 197552
	)	
WICHITA FALLS HISPANIC AMERICAN FAMILY FUNDATION	)	File No. BNPL- 20131114APB
	)	Facility No. 195666
	)	
SOUTH VICTORIA HISPANIC EDUCATION FAMILY FUNDATION	)	File No. BNPL- 20131115AIB
	)	Facility No. 197550
	)	
NORTH TAMPA COMMUNITY RADIO FAMILY FUNDATION	)	File No. BNPL-20131112AHQ
	)	Facility No. 194557

For New LPFM Stations

Filed With: Office of the Secretary
Directed to: The Commission

OPPOSITION TO APPLICATION FOR REVIEW

SUMMARY

This is the Opposition to the Application for Review filed by REC Networks in this proceeding against the grant of thirty-six LPFM applications for new stations.

As seen herein, the decisions of the Media Bureau granting these applications and denying the deficient Informal Objection filed by REC Networks three years ago should be affirmed. First of all, the Application for Review that has been filed is procedurally deficient. Moreover, on its substance, REC Networks continues to fail to

understand the Commission's standards. Throughout this proceeding, although it makes many allegations, REC Networks has been consistent in its failure to present evidence to the Commission sufficient to constitute a *prima facie* case to back up any of its allegations. In this case, despite its repeated claim that the applicants' consultants in this proceeding are "real-parties-in-interest" to the applications, at no time has REC ever presented even the slightest bit of evidence supporting its allegations. REC fails to accept or understand Commission precedent, and for these reasons, its Application for Review must be denied.

TABLE OF CONTENTS

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OPPOSITION TO APPLICATION FOR REVIEW

Little Rock Hispanic Education Family Fundation, et al. (*i.e.*, the other captioned parties) (hereinafter, the "Applicants"), by their attorney, hereby submit their Opposition to the "Application for Review" ("AFR") filed by REC Networks ("REC") in this proceeding. With respect thereto, the following is stated:

Background

The captioned applications in this proceeding were filed as a part of the 2013 FCC LPFM Filing Window for new Low Power FM facilities throughout the nation.[1] The Applicants each utilized undersigned counsel as its legal representative and contact representative, and Antonio Cesar Guel as its consultant. Legal counsel predominantly prepared the legal portions of the applications. Cesar Guel was predominantly involved in the preparation of the technical portions of the applications, and is also an Hispanic Pastor headquartered in Texas.

As established previously[2], prior to the close of the LPFM Filing Window, the Applicants' consultant undertook efforts to ensure that members of the Hispanic community throughout the country, wherever there is a significant Hispanic population, had knowledge of the FCC's LPFM Filing Window. Among the parties that were contacted were Pastors that had been dealt with previously, Hispanic churches in major cities, and members of local Church congregations. Other contacts were made by Pastors who contacted colleagues of their own, or who ran bible study schools to train Chaplains and Pastors, who contacted former students of theirs.[3] The goal of this outreach process was to economically (and efficiently) make the FCC's LPFM application process available to as many potential applicants as possible. Toward that end, when necessary[4], the Applicants' consultant assisted non-profit organizations in filing incorporation papers[5] (when their

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1 *LPFM Window to Open in October 2013, Revised Form 318 Released,* 28 FCC Rcd 8854 (2013).

2 *See, e.g.*, "Consolidated Opposition to Informal Objection and Petition to Deny," File No. BNPL-20131114BPF ("Consolidated Opposition"), Attachment 2.

3 Consolidated Opposition, Attachment 2 at 1.

4 As noted by REC (AFR at 5), many of the applicants already were established organizations (such as established Churches)) and did not require any new corporate organization.

5 Consolidated Opposition, Attachment 2 at 1-2:

organizations were not already incorporated) and, when necessary, finding local transmitter sites for the proposed operations and securing permissions for the sites. A generic educational statement was provided for many applicants to utilize, if they chose.[6] Nearly every single applicant assisted by the Applicants' consultant is an Hispanic Christian organization, and most such applicants agreed with the draft educational purpose statement provided to them, and had no changes to the draft educational statement whatsoever. Each organization itself provided information concerning such things as (i) the identities of the members of its organization, (ii) the location of its organization's headquarters, (iii) whether it intended its station to propose operation eight hours per day locally, and if so, (iv) at what location it intended to establish a local main studio.[7] Sometimes the Applicants' consultant dealt with the Applicants directly -- sometimes the Applicants' consultant dealt with applicants' representatives (*i.e.*, a Pastor who originally provided the applicant with the information).[8] When granted, each applicant will have the privilege of providing service to the local Hispanic community and running its own LPFM station.

> They chose us to be their representative to the process for requesting a radio station. In most cases, they didn't have a non-profit corporation, they really didn't have anything. At first, I started referring them with lawyers to process the documents in each of its states, but the more time went on we realized they weren't doing things right. The documents that were in the process weren't advancing even now we still have documents that have not been processed. Lawyers were charging very high sums of money and complicating things. We had a meeting with some of them and we concluded that HCCN would seek ways to speed up the process. When we started the process to register a corporation state by state we saw the same complications because some states had too many complications to make such records. I consulted with some pastors and they suggested me to ask the FCC if corporations had to be registered in their home state. After two or three days I personally ask my lawyer (Dan Alpert) in the FCC, he informed us the answer to this question; the FCC said they didn't had to be registered in their home state, they only had to be a non-profit corporation, and therefore can be legally registered in any state within the territory of the United States.

6 Consolidated Opposition, Attachment 2 at 2 ("[w]e suggested an educational purpose based on the principles of the Bible and each of the applicants were informed whether they agreed and had any change we could do, which mostly agreed").

7 Consolidated Opposition, Attachment 2 at 3.

8 Consolidated Opposition, Attachment 2 at 2.

Corporate filings on behalf of previously-unincorporated Churches and community groups, regardless of their location, were made by the Applicants' consultant's staff in the State of Texas[9], which allowed companies retaining his services to be fully incorporated as non-profit corporations in the State of Texas prior to the filing deadline of the FCC for LPFM applications, as required by the Commission's rules.[10] It will be up to individual Applicants operating outside of Texas to provide whatever additional filings they may be required to file (as foreign corporations) when, and if, they begin operations.

In the LPFM Filing Window nearly one-half of all the applications filed on behalf of the Applicants' consultant's clients were "accepted for filing" and thereby determined to be singleton applications fully in compliance with the Commission's technical rules.

On December 2, 2013, just shortly following the close of the LPFM Filing Window, REC filed an Informal Objection (the "REC Objection") directed against each and every one of the applications filed with the assistance of the Applicants' consultant (even those applications that has not yet been "accepted for filing"), characterizing the applications generically and inaccurately as "Guel Applications" (REC Objection at 1) and claiming generally and generically that the named applications should have been dismissed due to the fact that the applications each included the same educational statement (REC Objection at 2); the applications were filed in "alphabetical order" (REC Objection at 3); the applications all were incorporated in Texas and where applicable, where not registered as out-of-state non-profit corporations (REC Objection at 3); and some

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9 Consolidated Opposition, Attachment 2 at 1-2.

10 See, *Six Applications for Review of Decisions Regarding Six Applications for New Low Power FM Stations*, 28 FCC Rcd 13390, 13383 ¶ 10 (2013). Copies of those materials establishing their nonprofit status were filed with the Applicants' applications, as required by the instructions to the FCC Form 318. Instructions to FCC form 318, Section II, Question 2, Subsection (a).

applications had addresses that ostensibly were at "post office box facilities" or included main studios in "apartment complexes" or were at addresses that REC could not locate. REC Objection at 3-4. REC also argued that the applications were "holding up potential singletons from being granted." REC Objection at 4. Generally speaking, virtually no specific allegations of fact directed at individual applications were presented by REC. No affidavits or declarations under penalty of perjury ever were filed by REC as a part of its Informal Objection. In those rare cases when REC raised matters concerning the accuracy of a specific applicant's application concerning such matters as addresses of headquarters, over the course of time, corrections or updated information has been filed with the FCC via amendments filed under the Commission's rules as a matter of right.[11]

Consequently, by letter rulings released on August 23, 2016, August 24, 2016, and September 19, 2016, the Media Bureau ("Bureau") denied REC's Informal Objection, and granted the underlying applications. In the first letter ruling (which dealt with 28 pending LPFM applications), after first noting that pursuant to Section 309(d) of the Communications Act of 1934, as amended, petitions to deny and informal objections must provide properly supported allegations of fact that, if true, would establish a substantial and material question of fact that grant of the application would be *prima facie* inconsistent with the public interest, with respect to REC's various arguments, the Media Bureau stated:

> We reject the arguments that the Applications should be dismissed because of their similarities to each other or other applications filed by Guel as a consultant. REC and CF have failed to show that the Applicants have any actual affiliation beyond similar names, nor have they demonstrated that they are commonly controlled. Similarities in applications do not demonstrate common control of the applications. Additionally, the common contact representative identified in the Applications -- Guel -- is an engineering consultant. We have previously noted that it is common for multiple applicants to have the same engineering consultant, and many applicants will list their counsel or engineering

11 47 C.F.R. § 73.871(c).

> consultants as their contact representatives. We also reject REC's argument involving the sequential nature of the filing of the Applications or the Applicants' incorporation in Texas. These matters are attributable to the Applicants' utilization of a common consultant and present no violation of any Commission rule or policy.
>
> We also reject REC's argument that we should dismiss any applications for failure to comply with a state's foreign corporation rule. The Commission generally will not deny an application for a broadcast facility based on a licensee's or permittee's non-compliance with state corporate law "when no challenge has been made in the State Courts and the determination is one that is more appropriately a matter of state resolution.' We likewise reject CF's argument that the Applicants' non-profit status is dubious. CF has made no showing that the Applicants were improperly incorporated or are otherwise not recognized by the State of Texas.
>
> We also reject REC's arguments that LHCC and FEV are no longer eligible to hold an LPFM license. We have previously found an applicant for a full-service noncommercial educational (NCE) construction permit that had allowed its corporate status to lapse was still eligible for an NCE license because it had been reinstated by the state where it was incorporated and that reinstatement was given retroactive recognition by the state to the time the applicant filed its application." Here, LHCC's and FEV's corporate status has been reinstated by the TSOS and both entities have had their good standing restored." Thus, any gap in these applicants' legal corporate existence has been erased. Accordingly, LHCC and FEV have satisfied the eligibility requirements of the LPFM service.

Letter Ruling, August 23, 2016 at 5-7 (footnotes omitted). In the Commission's Second *Letter Ruling*, similar conclusions were reached by the Bureau with respect to eight additional pending LPFM applications. *Letter Ruling*, August 24, 2016 at 4-6. In addition, in response to arguments made by REC (*i.e.*, that unlike all other broadcast applicants, the Applicants involved in this proceeding should not be permitted to file amendments to correct defects in their applications *nunc pro tunc*), the Bureau stated:

> We disagree with REC's argument that the Applications cannot be reinstated *nunc pro tunc.* The Commission allows timely curative amendments except where such a cure is precluded by a specific rule or by clearly established policy. There is no such clearly-established policy prohibiting an LPFM from applicant from identifying a new address for its headquarters or board members and the LPFM minor change rule permits such address changes. As a matter of due process, we cannot treat the apparently erroneous addresses in the Applications as a fatal defect without having given the Applicants prior notice of such a policy. Additionally, REC does not cite to any cases -- and we are not aware of any -- where the Bureau or the Commission has limited the *Nunc Pro Tunc* Public Notice to applicants without an engineering consultant or legal counsel. Accordingly, we will accept the curative amendments, reinstate the Applications *nunc pro tunc,* and consider the pleadings filed against them.

Letter Ruling, August 24, 2016 at 4-5 (footnotes omitted). In the Bureau's third *Letter Ruling* dated September 19, 2016, the Bureau granted the application of North Tampa Community Radio.

On September 22, 2016, REC filed its Application for Review against the grant of these 36 LPFM applications[12], claiming (i) the Bureau's broad *nunc pro tunc* policy was inappropriately applied (AFR at 8-9); (ii) the Audio Division overlooked other recognized fatal flaws to reinstate (AFR at 9); (iii) the Bureau should have engaged in further investigation of the Applicants ostensibly because "this is more than just a case of common engineer and counsel" (AFR at 10-11, 13); and (iv) "the actions of Guel during the 2013 Window may have violated criminal statutes" (AFR at 12-13). REC also accuses the Bureau of being insufficiently equipped, *i.e.*, "inexperienced," to process applications in this proceeding. AFR at 9-10. No other party filing oppositions to the Applicants' application has filed an applications for review of the Bureau's determinations.

Argument

I. Procedurally, REC Has Failed to Comply with Section 1.115(b) of the Commission's Rules

There is no basis for grant of REC's Application for Review. First of all, procedurally, REC's AFR is deeply flawed. Section 1.115(b)(1) of the Commission's Rules clearly states:

> 1.115(b)(1)
> The application for review shall concisely and plainly state the questions presented for review with reference, where appropriate, to the findings of fact or conclusions of law.

47 C.F.R. § 1.115(b). At no place in the AFR does REC plainly or concisely present any specific questions that are being presented for review by the Commission.

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[12] Columbia Hispanic Education Family Fundation, File No. BNPL-201131114APY, cancelled its permit voluntarily following the release of the *Letter Ruling*.

In addition, in order to constitute a valid application for review, a petitioner must establish sufficient grounds for such review. The standards for such review are outlined in Section 1.115(b)(2) of the Commission's rules. As Section 1.115(b)(2) of the Commission's rules with respect to the filing of applications for review state:

> 1.115(b)(2)
> The application for review shall specify with particularity, from among the following, the factor(s) which warrant Commission consideration of the questions presented:
>
> 1.115(b)(2)(i)
> The action taken pursuant to delegated authority is in conflict with statute, regulation, case precedent, or established Commission policy.
>
> 1.115(b)(2)(ii)
> The action involves a question of law or policy which has not previously been resolved by the Commission.
>
> 1.115(b)(2)(iii)
> The action involves application of a precedent or policy which should be overturned or revised.
>
> 1.115(b)(2)(iv)
> An erroneous finding as to an important or material question of fact.
>
> 1.115(b)(2)(v)
> Prejudicial procedural error.

47 C.F.R. § 1.115(b)(2). REC has ignored this regulatory provision, as well, and significantly fails to identify any specific factor to be considered in this proceeding. Therefore, the REC AFR is procedurally deficient.[13]

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[13] In addition, the REC AFR is fifteen pages in length. Under Section 1.49(b), "all pleadings and documents filed with the Commission, the length of which as computed under this chapter exceeds ten pages, shall include, as part of the pleading or document, a table of contents with page references." 47 C.F.R. § 1.49(b). REC's AFR does not include a table of contents. Also, under Section 1.49(c) of the Rules:

> all pleadings and documents filed with the Commission, the length of which filings as computed under this chapter exceeds ten pages, shall include, as part of the pleading or document, a summary of the filing, suitably paragraphed, which should be a succinct, but accurate and clear condensation of the substance of the filing. It should not be a mere repetition of the headings under which the filing is arranged. For pleadings and documents exceeding ten but not twenty-five pages in length, the summary should seldom exceed one and never two pages; for pleadings and documents exceeding twenty-five pages in length, the summary should seldom exceed two and never five pages.

For these reasons, REC's Application for Review is procedurally flawed and not filed in accordance with the Commission's rules, policies and precedent, and therefore cannot be properly evaluated and given consideration by the Commission and must be denied.[14]

II. The Commission's *Nunc Pro Tunc* Policy Was Properly Applied

Amendments were filed in this proceeding that enabled certain applicants to update information in their applications and to perfect their applications, thereby allowing the applications to be granted. REC "questions the types of revision that can be made *nunc pro nunc*." AFR at 8. REC complains that the policy should not have allowed the applicants in this proceeding to correct or update addresses. AFR at 8-9.

By way of background, under well-established Commission precedent, following the dismissal of an application, applicants are afforded one opportunity to correct defects in applications and to seek reinstatement *nunc pro tunc*. *Commission States Future Policy on Incomplete and Patently Defective AM and FM Construction Permit Applications*, 56 R.R.2d 776 (1984). With regard to LPFM applicants, in particular, the Commission has explicitly provided for the filing of curative amendments:

> A tentative selectee whose application is found unacceptable for fling will be given a single opportunity to submit a curative amendment, provided that the amendment is minor and the amended application has the same number of points as originally claimed, or more than the points claimed by the next highest applicant. Tentative selectees whose applications remain unacceptable for filing after this opportunity will be removed from their mutually exclusive groups and will not be provided with an additional opportunity to amend.

Creation of a Low Power Radio Service, 15 FCC Rcd 2205, 2257 n.209 (2000) ("LPFM *Report and Order*"). This has been the rule and policy applicable to the entirety of both FCC LPFM

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47 C.F.R. § 1.49(c). The REC AFR does not include a summary as a part of its filing. For both these reasons REC's AFR is deficient in this respect, as well.

[14] *William J. Kirsch*, FCC 16-91 (July 14, 2016) ("[w]e dismiss, because [the] generalized request for review... fails to allege any of the grounds warranting Commission review specified in section 1.115(b)).

Windows. Accord, *Harry C. Martin, Esq.*, 20 FCC Rcd 12357, 12360 (MB 2005) ("[t]he Commission's rules permit the filing of minor amendments regarding an LPFM applicant's 'legal information' after the close of the filing window"; amendments are permissible "because they relate to the [applicant's] eligibility to become Commission licensees"). REC did not seek reconsideration of the LPFM *Report and Order* adopting that policy.

Therefore, REC's arguments should be rejected. First of all, REC attempts to support its arguments by bringing new evidence into this proceeding, by claiming that "there remains conflicting information as the State of Texas filings still reflect incorrect address" (AFR at 9) and providing a list of permits that ostensibly are "undeliverable." AFR at 9 n.24. This new information must be stricken. Section 1.1115(c) of the Commission's Rules states:

> 1.115(c)
>
> No application for review will be granted if it relies on questions of fact or law upon which the designated authority has been afforded no opportunity to pass.

47 C.F.R. § 1.115(c). This information is being submitted by REC for the first time in this proceeding as a part of its AFR, and under Section 1.115(c) of the Commission's Rules, cannot be considered. *Bernard Dallas LLC*, FCC 16-126 at 4-5 ("[t]hese new arguments are procedurally defective and we accordingly dismiss them"); *New Jersey Public Broadcasting Authority Request to Cancel License for Translator DW276BX, Pompton Lakes, New Jersey*, 29 FCC Rcd 5558, 5559 (2014) ("Mariana raises certain factual claims and legal arguments for the first time in its Application for Review. Section 1.115(c) of the Commission's rules prohibits parties from raising new arguments on review. Accordingly, we dismiss the new facts and arguments as procedurally barred and otherwise deny the Application for Review").[15]

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[15] Those records and addresses now all have been corrected.

More pragmatically, the Commission's policy of allowing applicants to cure acceptability defects to their applications has been applied liberally and judiciously for decades unless specifically excepted.[16] *Donald E. Martin, Esq.*, 27 FCC Rcd 12149, 12152 n.23 (MB 2012); *Hampton Roads Educational Telecommunications Association*, 30 FCC Rcd 14906, 14908 (2015) (under "longstanding procedures" applicants filing defective applications are permitted "to file a curative amendment to its application and seek reinstatement of its application *nunc pro tunc* within 30 days of its dismissal"). As recognized by the Bureau,[17] REC cited no case were the applicability of the policy adopted in the LPFM *Report and Order* has been limited to instances involving parties who "may be unfamiliar" with application requirements.[18] Therefore, the limitation on the applicability of the rule proposed by REC would involve the adoption of new policy in the middle of the Bureau's processing of LPFM applications.

For the Commission to establish a new standard at this late date, as REC seemingly proposes, would not be legally defensible. In the LPFM Window, other applicants were permitted the right to freely file corrective amendments, and under the principles espouses in *Melody Music, Inc. v. FCC*, 345 F.2d 730, 732 (D.C. Cir. 1965), the Bureau and the Commission is obligated to treat similarly situated applicants in identical fashions (*regardless* of which legal counsel or consultant they utilize). Moreover, REC's basis premise that certain types of applicants (*i.e.*, such as the applicants in this case) should suddenly be excluded from use of the long-standing policy, is untenable under standards imposed upon the Commission by the United States Court of Appeals.

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16 See, e.g., 47.C.F.R. § 73.870(c) (applications that fail to meet minimum distance separation will be dismissed "without any opportunity to amend such applications").

17 *Letter Ruling*, August 24, 2016 at 4-5.

18 Cf., e.g., "Opposition," File No. BNPL-20131112AFY, et al. at 5.

It is well-established that the Commission is not free to simply change its rules and establish new legal standards mid-stream. It is axiomatic that Section 553 of the Administrative Procedure Act ("APA"), 5 U.S.C. § 553, describes the procedures agencies must follow when required to notify all potentially interested parties before adoption of any proposed new rule and permit them to submit comments.[19] The Commission has broad authority under the APA to fashion policies through rulemaking or *ad hoc* adjudication. In contrast to an informal adjudication or a mere policy statement, which "lacks the firmness of a [prescribed] standard," an agency's imposition of requirements that "affect subsequent [agency] acts" and have a "future effect" on a party before the agency triggers the APA notice requirement. *Sugar Cane Growers Coop. v. Veneman*, 289 F.3d 89, 95-96 (D.C. Cir. 2002) (internal quotations and citation omitted). For purposes of the APA, "substantive rules" requiring notice and comment are those that effect change in existing law or policy or which affect individual rights and obligations. See, e.g., *Paralyzed Veterans of America v. West*, 138 F.3d 434 (Fed. Cir. 1998).[20] REC would have the Commission simply ignore those principles.

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[19] The Court has observed that the notice requirement of the APA does not simply erect arbitrary hoops through which federal agencies must jump without reason. Rather, the notice requirement "improves the quality of agency rulemaking" by exposing regulations "'to diverse public comment,'" "ensures "'fairness to affected parties,'" and provides a well-developed record that "enhances the quality of judicial review." *Small Refiner Lead Phase-Down Task Force v. United States EPA*, 705 F.2d 506, 547 (D.C. Cir. 1983) (citations omitted).

[20] Although the precise difference between policy statements and interpretive rules is the subject of some dispute, see *Appalachian Power Co. v. Environmental Protection Agency*, 208 F.3d 1015, 1021 n. 13 (D.C. Cir. 2000), courts have observed that a policy statement "does not seek to impose or elaborate or interpret a legal norm," but rather "represents an agency position with respect to how it will treat—typically enforce—the governing legal norm." *Syncor International Corp. v. Shalala*, 127 F.3d 90, 94 (1997) (emphasis added). "By issuing a policy statement, an agency simply lets the public know its current enforcement or adjudicatory approach. . . . Policy statements are binding on neither the public, nor the agency." *Id.* (citations omitted); see also *United States Telephone Ass'n v. FCC*, 28 F.3d 1232, 1234 (D.C. Cir. 1994) ("["[T]he paradigm of a policy statement [is] an indication of an agency's current position on a particular regulatory issue.").

An interpretive rule, on the other hand, "typically reflects an agency's construction of a statute that has been entrusted to the agency to administer." *Syncor International*, 127 F.3d at 94.

In short, the Commission is obligated to apply its rules and regulations uniformly[21], and treat similarly situated parties in a similar manner.[22] Moreover, the Commission, and those members of the public affected, are entitled to demand strict adherence to its rules. *Salzer v. FCC*, 778 F.2d 869, 871, 875 (D.C. Cir. 1985); *McElroy Electronics Corp. v. FCC*, 88 F.3d 248, 257 (D.C. Cir. 1996). In this case, the Bureau applied accepted Commission policies to both the applicants in this case as well as to REC Networks' clients. If REC wishes the Commission to change its rules and policies, REC has been free to petition the Commission (through the Commission's rulemaking processes) for such a change.[23] It evidently has chosen not to do so.[24] That being the case, REC's argument is really no different than that raised, and rejected, in *Jerrold Miller*, 23 FCC Rcd 9362, 9365 (MB 2008) where an petitioner complained that an applicant's application should not be reinstated *nunc pro nunc*. The Bureau rejected that argument, stating:

> As noted above, the Commission has established a processing policy which specifically permits the reinstatement *nunc pro tunc* of a dismissed application found initially to be unacceptable for filing where the petition for reconsideration is, as here, accompanied by a minor curative amendment. Radio One fails to cite any Commission precedent that would support a departure from this processing rule or show that this processing policy was erroneously applied in this case.

Substantive rules, in contrast to both interpretive rules and policy statements, modify or add to a legal norm, based on the agency's own authority. *Id.* at 95. "That authority flows from a congressional delegation to promulgate substantive rules, to engage in supplementary lawmaking." *Id.* When the agency is engaged in lawmaking, the APA requires it to comply with notice and comment. *Id.*

21 *McElroy Electronics Corp. v. FCC*, 86 F.3d 248, 257 (D.C. Cir. 1996).

22 *Melody Music, Inc. v. FCC*, 345 F.2d 730, 732 (D.C. Cir. 1965) (similarly situated cases should not be treated dissimilarly).

23 *Six Applications for Review of Decisions Regarding Six Applications for New Low Power FM Stations*, 28 FCC Rcd 13390, 13401 ¶ 32 (2013) (Commission declines to change processing rules in the context of LPFM adjudication, noting applicant may "propose this change in a petition for rulemaking with the Commission, pursuant to Section 1.401 of the Rules."

24 REC, in essence, is advocating the adoption of a "hard look" application standard for LPFM applications – a standard the FCC briefly adopted for commercial FM stations from 1985 - 1998,[24] but specifically eliminated in *Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Services Licenses*, 13 FCC Rcd 15920 (1998).

* * *

> To the extent that Radio One believes that a different processing rule would better serve the public interest, it should file a petition for rulemaking.

Id. at 9365 (footnotes omitted). The same admonition to REC is appropriate in this case, as well.

III. There Are No Defects Remaining in the Gary Hispanic Community Radio Application

The REC Informal Objection did not ever argue that the application of Gary Hispanic Community Radio should be dismissed because it had engaged in a major change of ownership.[25] Nevertheless, in its AFR, REC argues that the application for a new LPFM station filed by Gary Hispanic Community Radio should not have been granted by the Bureau (AFR at 9), claiming that "[i]n a rush to clear...workload...the Commission further noted that the first amendment to the application resulted in a major change as it resulted in a change of the governing board by 66 percent in violation of §73.871(c) of the Commission's Rules....[T]he application is still defective..." AFR at 9.

REC is wrong. This factual matter already has been dealt with, clarified, and cured. As the Gary Hispanic Community Radio applicant already stated in its proceeding:

> As a final grounds for dismissal of the GHCR application, the Bureau claims that there was a 66% change in ownership in the first amendment filed with respect to the application, and as a result, there has been a major change in ownership. Letter at 3. The Bureau is mistaken. The original application specified both Israel Correa and "Altagracia" Correa as Directors of the application. "Altagracia" is Ms. Correa's unofficial name (essentially, her nickname) used by her family. In the first amendment, as reflected in Exhibit 1 to the first amendment to the application, one of the changes being made was to "Section II – 3A-1,4 Correct Name and Address." In that amendment, Altagracia's name was corrected to her formal legal name "Marisol" Garcia.
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> In short, both Israel Correa and Marisol ("Altagracia") Correa remain as parties to the application. There has been no "major change" in the control of the organization.

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[25] As is many others, this argument therefore is being advanced by REC in violation of Section 1.115(c) of the Commission's Rules. 47 C.F.R. § 1.115(c).

"Petition for Reconsideration," File No. BNPL-2013112AFY (April 4, 2016) at 9. Nothing in REC's Opposition to that Petition rebutted that information. See, Opposition, File No. BNPL-2103112AFY (April 12, 2016).

In this case, REC is guilty of making serious allegations to the Commission (in the course of an "application for review," no less) without the benefit of informed research, and thereby wasting the Commission's time on a trivial (and inaccurate) matter.

IV. No Showing Has Been Made Demonstrating the Existence of Any Real-Party-in-Interest in this Proceeding

REC made no specific showing in its Informal Objection that the Applicants' consultants were real parties-in interest to any of the named Applicants in this proceeding. Nevertheless, as a part of its AFR, REC now makes that claim.[26] AFR at 10-11. The only evidence to which REC points is the similarity of the original applications and incorporations that were filed with the assistance of Applicants' consultants. *Id.* No direct evidence of such a (non-existent) relationship, *i.e.*, through the submission of a single declaration or affidavit, has been presented, as required by the Communications Act and Commission policies. Instead, REC wails that the Bureau should be seeking out that information itself that REC believes exists, through an "investigation" (AFR at 13), and that the Bureau's failure to do so is based upon its "inexperience." AFR at 9-10.

REC has at no time provided any evidence of any outside "control," because no such "control" exists. Regardless of the circumstances surrounding applicants' introduction to the LPFM application process, the Applicants will operate their own facilities, and nothing in the way of evidence provided by REC or others establishes otherwise. The *sine qua non* of a valid claim

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[26] As is many others, this argument therefore is being advanced by REC in violation of Section 1.115(c) of the Commission's Rules. 47 C.F.R. § 1.115(c).

of "real party in interest" is evidence indicating that a third party will control the finances, programming, or personnel of an applicant. *Patrick Vaughn, Esq.*, 28 FCC Rcd 10115, 10124 (MB 2013); *David D. Oxenford*, 27 FCC Rcd 13363 (MB 2012); *Catholic Social Club of Putnam County Tennessee, Inc.*, 26 FCC Rcd 5057 ("The test for determining whether a third person is a real party in interest is whether that person has an ownership interest, or is or will be in a position to actually or potentially control the operation of the station"). The corporate documents already submitted as a part of the applications spell out the manner in which control is exercised within each corporation. "Cesar Guel" has absolutely no power to control the affairs of any of the applicants. As the Applicants' consultant unambiguously confirmed in this proceeding:

> Applicants for building permits issued by the FCC will be responsible for operating their own stations. They would choose their own schedule. HCCN will remain available for any applicants that are successful or not, to assist in the construction of its stations from beginning to end. Antennas, transmitters, studios and engineers for these jobs will be recommended by HCCN, there is no obligation on the part of any applicant to employ HCCN in any of these buildings in the future. Our obligation finish when the LPFM window closed.

Consolidated Opposition, Attachment 2 at 2-3.

More to the point, it is significant that even now, after just shy of three years since the applications were filed, REC has yet to present to the Commission *even one shred* of evidence demonstrating any financial or other improper ties between the Applicants and its consultants, or even the *merest hint* of the actual existence of the "Guel-network" that it fears is being created.[27] While there is no question that the Applicants' consultant provided similar work-product to all of its similar Hispanic-based clientele (as ably demonstrated by REC (AFR at 11)), those similarities

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[27] See, e.g., AFR at 3, n.1, referring to the non-existent "network of stations" Guel allegedly is attempting to build. This same accusation has been made previously, and is a consistent element of REC's repeated diatribe to the Commission.

simply as existed at the time the applications[28] initially were filed were a function of the fact that the same consultants drafted the applications, and as the Bureau has pointed out, those similarities are "attributable to the Applicants' utilization of a common consultant and present no violation of any Commission rule or policy." *Letter Ruling*, August 23, 2016 at 5-7 (footnotes omitted).

> We reject the arguments that the Applications should be dismissed because of their similarities to each other or other applications filed by Guel as a consultant. REC and CF have failed to show that the Applicants have any actual affiliation beyond similar names, nor have they demonstrated that they are commonly controlled. Similarities in applications do not demonstrate common control of the applications.

Id. at 5-6. The Applicants' consultants' names were prominently was included on each and every application. In a case such as this, that there are similarities between the applications should not only not be surprising, it should be *expected.* The similarities are not probative of whether there exists a legally-cognizable "real-party-in-interest relationship. To the extent REC claims that the Applicants engaged in deception to the Commission by engaging in a "abuse of process," "lack of candor" (AFR at 6) or "misrepresentation" (AFR at 8 n.21), in order to sustain such charges, REC had the burden to establish a *prima facie* case both a false statement or certification by the Applicants and intent to deceive the Commission.[29] As evidence, REC offers only evidence showing the similarities in applications. That proof, standing alone, does not satisfy the burden.[30]

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[28] Through the filing of amendments, many of those similarities do not even any longer exist.

[29] *Fox River Broadcasting, Inc.*, 93 F.C.C.2d 127, 127 (1993); *Scott and David Enterprises*, 88 F.C.C.2d 1090, 1099 (Rev. Bd. 1982).

[30] *Mt. Zion Educational Association*, 25 FCC Rcd 15088, 15091-92 (MB 2010).

[31] As is many others, this argument was not presented to the Bureau below, and therefore is being advanced by REC in violation of Section 1.115(c) of the Commission's Rules. 47 C.F.R. § 1.115(c).

Promoting locally-based radio which will serve a previously underserved population is precisely the goal the Applicants' consultant hoped to and helped fulfill in publicizing the LPFM Filing Window and making his services available. The parties in this proceeding all are applicants fully qualified to become Commission licensees, and no involvement on the part of their consultants in assisting those applicants undermines those qualifications.

V. REC's Allegations of Criminal Conduct of Frivolous

REC argues that "the actions of Guel during the 2013 Window may have violated criminal statutes," citing 18 U.S.C. § 1001. AFR at 12. There are two problems with an allegation such as this. First, this argument has not been raised by REC previously, and once again, Section 1.1115(c) of the Commission's Rules states:

> 1.115(c)
>
> No application for review will be granted if it relies on questions of fact or law upon which the designated authority has been afforded no opportunity to pass.

47 C.F.R. § 1.115(c). On this basis, this portion of REC's AFR must be stricken. Secondly, enforcement of this statute is outside the jurisdiction of the FCC, and there has been no adjudication of such wrongdoing. It is well established that the FCC's policy regarding what sort of court rulings are relevant and impact upon a licensee's or applicant's "character qualifications" is set forth in the Commission's character policy statements, [32] and under Commission policy there must be an ultimate adjudication by an appropriate trier of fact (either by a government

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[32] *Policy Regarding Character Qualifications in Broadcast Licensing*, 102 FCC 2d 1179 (1986) *recon. granted in part and denied in part*, 1 FCC Rcd 421 (1986), *appeal dismissed mem. sub nom National Assoc. for Better Broadcasting v. FCC*, No. 86-1179 (D.C. Cir. June 11, 1987); *Policy Regarding Character Qualifications in Broadcast Licensing, as modified*, 5 FCC Rcd 3252 (1990), *recon. granted in part*, 6 FCC Rcd 3448 (1991), *modified*, 7 FCC Rcd 6564 (1992).

agency or court) before the Commission will consider the activity.[33] There has been no such adjudication here. Finally, REC cites no case, nor can it, where convictions of *engineering consultants*, even were one ever to occur, affects the qualifications of underlying applicants.

No *prima facie* case of misrepresentation has ever been made in this proceeding. See *supra* at 19. For all these reasons, REC's arguments in this regard as well are frivolous and misinformed, and should be rejected.

Conclusion

The REC Informal Objection, and now, its Application for Review, boils down to one single proposition – that REC is "suspicious" that all applications, that received assistance from a given consultant, all had similar characteristics at the time they were initially filed. However, from the outset, their consultant's involvement (and that these all are Hispanic Christian-based groups) was never hidden, so that similarities exist between applications should be viewed as "not surprising" rather than "suspicious" -- especially insofar as *undersigned legal counsel* was the individual preparing the majority of the LPFM applications. More pragmatically, rather than REC engaging in the *slightest* bit of investigation to determine whether its suspicions were in any way true, REC went ahead and filed its Informal Objection – against 245 applications (!) – simply based on its "hunch" (based evidently on similarity of names, state of filing, and similarity of educational purpose), alone. Moreover, it is significant to note that there exists in this proceeding not even one Affidavit or Declaration prepared under penalty of perjury in the REC Objection attesting to *any* of the alleged "facts" contained in the Petition – not even one by REC Networks vouching for the accuracy of the allegations contained in the REC Objection. Insofar as REC must have known

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[33] *Policy Regarding Character Qualifications in Broadcast Licensing*, 102 FCC 2d 1179, 1204-1206 ¶ 48 (1986).

that the FCC requires specific allegations of facts supported either by affidavits, declarations under penalty of perjury (or where applicable, information of which official notice may be taken) when evaluating petitions and informal objections (not mere speculation and surmise), it must have known that its Informal Objection was deficient.

Clearly, from the outset of this proceeding, REC wanted to bully and "wish away" the so-named "Guel applications" in favor the "REC Applications." Once upon a time, REC suggested that "some states" have restrictions on foreign corporations – however, regardless of whether individual applicants were planning on doing business in such a state, REC filed its cookie-cutter Informal Objection against them. REC Objection at 3.[34] REC also objected generally to studios that "may be" placed in strip malls or apartment buildings, suggesting those locations may be problematic, *i.e.*, speculating that it is "highly unlikely" whether "this type of business" could be operated out of a rental apartment or a gated community, and that such a location "may violate" zoning ordinances (REC Objection at 4), without evidently for *even one* of its questions or concerns doing the investigation itself, prior to filing the original Informal Objection. Stated otherwise, rather than investigate any one of those situations, REC was content to *raise* questions and give voice to its suspicions, but without (as required) providing the Commission with any meaningful information demonstrating that a problem with the proposed locations *actually* existed.[35] Even now, following the Bureau's release of its *Letter Rulings* which determined that

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[34] After nearly three years of pursuing this novel argument against LPFM applicants, in filing its Application for Review, REC finally abandoned this argument. AFR at 5 n.6.

[35] The ironic thing is that with regard to these sorts of concerns, they involved only the award of "points," and if and when any particular application is declared the winning application under the Commission's point system, REC Networks would have had the opportunity the fly-speck the winning applications to their heart's content, and attack the award of such points (if and when such an attack on the points being awarded to a particular applicant becomes relevant), hopefully by raising specific allegations of facts supported by affidavits or declarations submitted under penalty of perjury, establishing the veracity of any concerns as they may have.

the applications were deserving of grant, REC fails utterly to identify and present *evidence* with regard to any specific defect that it believes still exists with respect to any individual application and bring that matter to the Bureau's attention through the filing of a timely-filed petition for reconsideration.

REC Networks also obviously has long wanted to have applicants utilizing consultants other than itself essentially "punished" with additional regulatory burdens for their utilization of such services (REC Objection at 5). As the record shows in this proceeding, REC took upon itself to impose its own regimen and requirements upon applicants such as those in this proceeding. On its web-site, it made the following offer:

> In the event that your organization is one of the 245 applicants that REC has field an informal objection against, REC is willing to withdraw our objection against the specific application upon the presentation of the following:
>
> Notarized statements from all persons listed as a party to the application attesting that they are actually a part of this organization. These statements must bear the notary seal for a county within 20 miles of the transmitter site.
>
> An amended LPFM application with a specific educational statement (Exhibit 2) that specifically describes the organization, what the organization does in the local community and how the LPFM radio station will advance the organization's educational program.
>
> The LPFM applicant must not amend the application to reduce the number of points, even if a "singleton".
>
> A statement from the property owner of the transmitter site as well as the proposed main studio location giving permission for the placement of a broadcast tower and/or radio studio at the location. (The main studio must be at a business location that is accessible to the public without substantial security barriers or charging of admission).
>
> For applicants outside of the state of Texas and had HCCN handle the organization's corporation filing, evidence of a foreign corporation filing in states that require it.
>
> * * *
>
> Just know that the ability to do an informal objection is available to any member of the general public, it does not carry much weight at the FCC as does a Petition to Deny. Any actions you may take to respond to our offer to withdraw our objection is done at your own free will and you waive REC of any liability as a result of any actions taken or expenses incurred as a result of responding to our request.

Consolidated Opposition, Attachment 4.

The applicants in this proceeding are indeed non-profit organizations, and in total compliance with all announced FCC rules and policies. No specific information has been gathered in any way suggesting, *e.g.*, that Applicants' educational purposes are deficient, that their principals are not valid, that their transmitter sites are not available, etc. In an abuse of the FCC regulatory processes, REC Networks has taken upon itself to singularly impose essentially its own set of rules against applications it opposes, and REC thereby (i) delayed service to the public, and (ii) dramatically increased the FCC's workload by forcing the FCC to deal with the REC Informal Objection in resolving many applications such as those in this proceeding; and (iii) increased dramatically the costs incurred by such other LPFM applicants. It has now been nearly three years since the initial filing of the LPFM applications in this proceeding. During that time, REC essentially has used and abused the FCC's pleading processes to hold the applications in this proceeding hostage, in a manner contrary to the overall public interest, by delaying the grant of these singleton applications and the initiation of LPFM service to those communities for which they applied. To a certain extent, that tactic on the part of REC is continuing through the filing of its Application for Review in this proceeding.

Section 309(a) of the Communications Act provides that the Federal Communications Commission may grant a broadcast license when it determines that doing so would serve the "public interest, convenience, and necessity." 47 U.S.C. §309(a). Under §309(d) of the Act, any interested person may petition the FCC to deny or to set for hearing any application for a broadcast license or to revoke an existing broadcaster's license. However, the petition must contain specific allegations of fact sufficient to show that ... a grant of the application would be *prima facie* inconsistent with [the public interest, convenience, and necessity]. Such allegations of fact shall ... be supported by affidavit of a person ... with personal knowledge thereof. 47 U.S.C. §309(d).

Section 309(d) of the Communications Act therefore places on a *petitioner* seeking denial of an application, such as REC, the burden of demonstrating why grant of the applications in question would be inconsistent with the public interest. Notwithstanding their many attempts to do so with numerous untimely and unauthorized pleadings containing a myriad of speculative allegations, REC has simply failed to meet their statutory burden here. REC has failed to demonstrate any substantive or procedural error by the Bureau or a conflict with any statute, regulation, case precedent, or Commission policy. Therefore, the Commission should deny in full the REC Application for Review, and affirm the grant of the applications specified herein.

WHEREFORE, it is respectfully requested that the Application for Review, filed by REC Networks, be denied.

Respectfully submitted,

LITTLE ROCK HISPANIC EDUCATION FAMILY FUNDATION et al.

By: _____/Dan J. Alpert/_____
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Their Attorney

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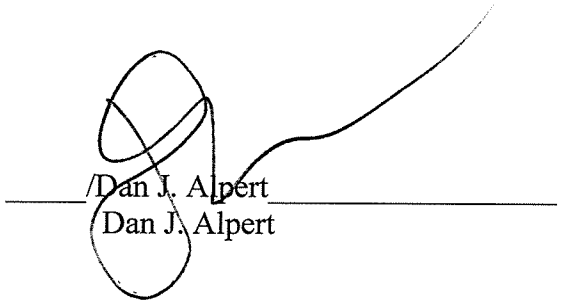
October 17, 2016

CERTIFICATE OF SERVICE

I hereby certify that a copy of the forgoing Opposition to Application for Review is being served on the following party to this proceeding via First Class Mail:

Ms. Michelle Bradley
REC Networks
11541 Riverton Wharf Rd.
Mardela Springs, MD 21837



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