

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of Applications of	)	File No. BNPFT-20180507ADJ
	)	File No. BNPFT-20180507ADK
IMMACULATE HEART MEDIA, INC.	)	File No. BNPFT-20180507ADL
	)	File No. BNPFT-20180509AAH
For Construction Permits	)	File No. BNPFT-20180509AAJ
For New FM Translators	)	File No. BNPFT-20180509ACW
	)	File No. BNPFT-20180509ACY
To: Office of the Secretary	)	File No. BNPFT-20180509ADF
Attention: The Commission	)	File No. BNPFT-20180509ADH
	)	File No. BNPFT-20180509ADK
	)	File No. BNPFT-20180509ADL

OPPOSITION TO APPLICATION FOR REVIEW

Immaculate Heart Media, Inc., (“IHM”) by its attorney, pursuant to 47 C.F.R. § 1.115, hereby opposes the Application for Review (“AFR”) filed August 10, 2018, by Common Frequency, Inc., and Prometheus Radio Project (collectively “Objectors”).¹ Because the AFR suffers from numerous defects, it must be dismissed or denied, and the Objectors themselves should be sanctioned for an abuse of the Commission’s processes.²

I. Background

On May 7 and May 9, 2018, IHM filed the above-referenced “long-form” applications for construction permits for new FM translator stations at various locations (“IHM Applications”). On May 16, 2018, Objectors filed an Informal Objection (“Objection”). On June 8, 2018, the Audio Division, on its own motion, dismissed and denied the Objection (“Objection Denial Order”). Within a few days thereafter, the Audio Division granted 10 of the 11 above-referenced

¹ Center for International Media Action was an original objector, but did not participate in filing the AFR.

² The CDBS indicates that the AFR was filed August 13, 2018. The AFR is dated August 10, 2018, and the Certificate of Service is dated August 14, 2018. This Opposition is timely filed by August 28, 2018, as it was served by mail (Oppositions to be filed within 15 days following the date of filing).

IHM Applications.³ On July 9, 2018, Objectors filed a Petition for Reconsideration of the dismissal/denials (“Petition for Reconsideration”), but directed reconsideration to only 328 applications out of the original 994.⁴ On July 13, 2018, the Audio Division promptly and correctly denied Objectors’ Petition for Reconsideration (“Recon Denial Order”). On August 10, 2018, Objectors filed the AFR. The Petition for Reconsideration reduced their objections to “just” 666 applications, and the AFR appears to target fewer than that number, but the IHM Applications, each of which are paired with certain of IHM’s full-power AM broadcast stations, have still been caught up in the Objectors’ shotgun-blast pleadings.⁵

II. Procedural Defects

The AFR must be rejected for failing to comply with various sections under Part 1 of the Commission’s Rules, including Sections 1.16, 1.52, 1.49 and 1.115. Such non-compliance is fatal.

Section 1.16 provides that an application for review must include a declaration or affidavit in support thereof by a natural person. The Commission even makes it easy by including a form of declaration within the rule. Section 1.52 provides, in pertinent part, “A party who is not represented by an attorney shall sign and verify the document and state his address.” (Emphasis supplied.) The AFR is signed by two persons named Todd Urick and Paul Bame, who are not identified as attorneys. However, the AFR does not include an affidavit or other verification by either person. Accordingly, the Commission must dismiss the AFR outright. In *Channel 61*

³ IHM’s application for a new FM translator at Wilmington, DE (File No. BNPFT-20180509ADL) remains pending.

⁴ To illustrate the slapdash nature of the Objectors’ work, the original Informal Objection attacked not only pending applications for new stations, but also granted applications and applications for modification of existing authorizations. In addition, the *Objection Denial Order*, at note 2, indicates that Appendix A to the Objection lists 998 applications against which the Objection was filed, while the Media Bureau’s Consolidated Data Base System (“CDBS”) indicates the Objection was filed against 994 applications.

⁵ In addition to the above-referenced IHM Applications, IHM also filed four additional applications for new FM translator construction permits on May 9, 2018. Those other four applications, each of which were granted in the days immediately following the issuance of the *Objection Denial Order*, were included as part of the Objection, but were removed from the Objectors’ Petition for Reconsideration and AFR.

Associates, LLC, 31 FCC Rcd 1340 (2016), the Commission’s Video Division rejected a proffered pleading captioned a “petition to deny” on the grounds that it violated Sections 1.16 and 1.52 (“[a]pplicants correctly state that the Petition contains no verification under penalty of perjury, in violation of sections 1.16 and 1.52 of the Commission's Rules....Accordingly, we will dismiss [the party’s] pleading as a petition to deny. We will, however, treat the pleading as an informal objection pursuant to Section 73.3587 of the Rules.”) Because there is no provision in the Commission’s rules whereby an Application for Review can be treated as an informal pleading, the Objectors’ AFR must be dismissed altogether. See also *FM Table of Allotments, Provincetown, Massachusetts et al.*, 8 FCC Rcd 19 (Media Bur. 1992) (proposal dismissed because statements of non-attorney consultant are insufficient and in violation of Section 1.52 of the rules.)

Under Section 1.49(c) of the Commission’s rules, pleadings exceeding 10 pages in length must include a summary. The AFR is 22 pages in length and does not include such a summary. The “Table of Contents” included with the AFR is a “mere repetition of the headings under which the filing is arranged,” which is specifically prohibited by Section 1.49(c).

The AFR also blatantly violates Section 1.115 of the Commission’s Rules, which sets forth the specific form and substance required from an application for review. Section 1.115(b)(2) requires a showing that the previous actions taken by the Commission staff pursuant to delegated authority: (i) are in conflict with statute, regulation, case precedent, or established Commission policy; (ii) involve a question of law or policy which has not previously been resolved by the Commission; (iii) involve application of a precedent or policy which should be overturned or revised; (iv) involve an erroneous finding as to an important or material question of fact; or (v) involve prejudicial procedural error.

A plain reading of the AFR reveals that these factors are not present at all. Indeed, the AFR is merely a flamboyant rhetorical⁶ exercise rehashing the same arguments that were presented to and rejected by the Audio Division. As a result, the AFR must be dismissed. *See Blanchard, Louisiana and Stephens, Arkansas*, 10 FCC Rcd 9828 (1995) (“[u]nder Section 1.115(b)(2), 47 C.F.R. § 115(b)(2), an application for review must list the factors warranting Commission consideration from among an enumerated list. Absent compliance, the application may be dismissed as procedurally defective. *See also Chapman S. Root Revocable Trust*, 8 FCC Rcd 4223, 4224 (1993) (“[t]he Application did not list the factors warranting Commission review. Accordingly, the Application is subject to dismissal as defective.”).

III. Objectors Have Not Shown Any Error in the *Recon Denial Order* or the *Objection Denial Order*.

Objectors have failed to show any reason why the Commission should review the *Recon Denial Order* or the *Objection Denial Order*. The scattershot AFR is, like the Objectors’ previously-filed Objection and Petition for Reconsideration, completely lacking as to any allegation of specific facts that, if true, would establish a substantial and material question of fact that grant of any of the IHM Applications would be inconsistent with the public interest.⁷ In short, Objectors have not made out any case that they are parties to any of the applications they targeted, and certainly not with respect to any of the IHM Applications. They have provided no declaration

⁶ One particularly florid sentence (AFR p. 5) wails, “Petitioners have invested large sums of grant money and private funding to assure the sustainability of LPFM across the country. The Commission’s failure to address the Reconsideration represents a loss to all of the volunteer stakeholders associated with the struggle to ensure LPFM solvency – those who have donated time, money, professional services, training, equipment, etc., with the expectation that each LPFM can survive with the acquired tools to collect donations, membership, and underwriting.” This reveals that the AFR is apparently a ruse to plead for more donations to Objectors. The AFR ignores the financial distress imposed on AM broadcasters brought on by the Objectors’ fiasco.

⁷ The *Recon Denial Order* at 2 expressly rejected Mr. Urick’s claim of standing with respect to IHM’s construction permit for a new FM translator at Rocklin, CA (BNPFT-20180507ADL), finding that he failed to “state whether or how he would be adversely affected by grant of” that application and furthermore failed to explain why he did not participate in the earlier stage of the proceeding.

or affidavit from anyone. Objectors simply do not have standing and are not adversely aggrieved, as required under 47 U.S.C. §405(a).

The AFR is awkwardly written and basically gibberish, but reading it in the most charitable light, it seems that the Objectors are concerned that the Commission's assignment of FM translators during the recent windows, permitting up to 250 mile relocation of translators and the opening of two windows for filing applications for new FM translators,⁸ somehow had a negative preclusionary effect on LPFM allotments and violates the Local Community Radio Act of 2010.⁹ This is hogwash.

The FM translators authorized by the *AMR R&O* were limited to AM licensees who, in some cases, need FM translators in order to survive the onslaught of competition from broadcast and non-broadcast sources. The AM stations are real radio stations, serving their communities now. The public interest would not be served by reserving the spectrum for some future day when LPFM stations might come along. Indeed, the evidence shows that LPFMs, in many communities, are utterly failing.¹⁰

Both the *Objection Denial Order* and the *Recon Denial Order* meticulously addressed the Objectors' concerns. Both of those actions are properly supported by the facts and the law. There is simply no error for the full Commission to correct, and no demonstration of any compliance with Section 1.115 of the Commission's rules.

⁸ See *Revitalization of the AM Radio Service*, First Report and Order, Further Notice of Proposed Rule Making and Notice of Inquiry, 30 FCC Rcd 12152 (2015) ("*AMR First R&O*").

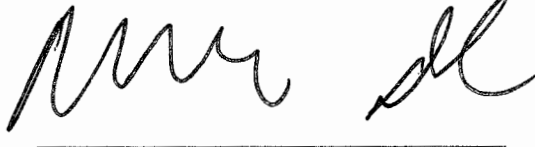
⁹ Pub. L. 111-371, 124 Stat. 4072 (2011).

¹⁰ In just the past three years, CDBS shows that 21 LPFM licenses have been cancelled. That figure does not include many other LPFM stations that have simply ceased operating, but have not filed the paperwork to cancel their licenses.

Based upon the foregoing, IHM respectfully requests the Commission to dismiss or deny Objectors' AFR.

Respectfully submitted,

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August 27, 2018

CERTIFICATE OF SERVICE


I, Mark B. Denbo, do hereby certify that a copy of the foregoing "Opposition to Application for Review" was mailed, by First Class U.S. Mail, postage prepaid, this 27th day of August, 2018, to the following:

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