

BEFORE THE
Federal Communications Commission
WASHINGTON, D. C. 20554

In re Applications of)
)
PUNJABI AMERICAN MEDIA, LLC) File No. 0000096228
K290CT, Elk Grove, California) Facility ID # 85824
)
For Covering License)

TO: Honorable Marlene H. Dortch
 Secretary of the Commission

ATTN: Audio Division, Media Bureau

OPPOSITION TO
PETITION FOR RECONSIDERATION

Punjabi American Media, LLC (PAM), licensee of AM Broadcast Station KIID, 1470 kHz, Sacramento, California and FM Translator Station K290CT, Elk Grove, California, by its attorney, pursuant to Section 1.106(g) of the FCC's Rules, hereby respectfully submits this Opposition to the "Petition for Reconsideration" electronically filed by Charles Gwyn (Gwyn) on February 3, 2020.

In support whereof, the following is shown:

Preliminary Statement

1. Gwyn's petition is his latest attempt to vex, harass and oppress PAM, a minority-owned broadcaster which provides a unique program service to serve the south Asian community in metropolitan Sacramento, California. Gwyn was involved with a scheme to obtain

an FCC license for now-deleted Low Power FM Station KWCS-LP, Sacramento, California, which he temporarily "constructed" in a manor inconsistent with that station's construction permit. PAM caught him in the act, and, as a result, the KWCS-LP covering license application was rejected by the FCC. See Exhibit A, Audio Division letter to Gwyn dated August 24, 2018.

2. PAM's construction permit application, File No. BPFT-20160729ALZ, was filed in a so-called "250 mile window", where licensees of AM broadcast stations were permitted to acquire and/or relocate existing FM Translator Stations within a 250 mile radius of the AM station to rebroadcast said AM station. It was mutually-exclusive with a similar 250 mile window application from New Inspiration Broadcasting Company, Inc. (NIBC), licensee of KFIA(AM), Carmichael, California (K245AR, File No. BPFT-20160729ANB). At the time, both applications specified 105.7 MHz.

3. In order to resolve the mutual-exclusivity, PAM filed an amendment to File No. BPFT-20160729ALZ on December 11. 2017, the first business day after the expiration of the KWCS-LP construction permit. It specified a frequency shift from 105.7 MHz to 105.9 MHz and an amended transmitter site within 250 miles of the licensed transmitter site of both K227AH, River Pines, California as well as KIID(AM) in Sacramento. There was no timely objection to the amendment from Gwyn on the grounds that it constituted a "major change" proscribed by Section 74.1233(a)(1) of the FCC's

Rules. Both PAM and NIBC understood that FCC's 250-mile window procedures permitted the PAM December 11, 2017 amendment.

4. The PAM construction permit for relocation of K227AH to 105.9 MHz at Elk Grove, California was granted on October 3, 2018 simultaneously with the grant of the NIBC construction permit for relocation of K245AR to 105.7 MHz at Sacramento. In reliance on the granted construction permit, PAM constructed the new K290CT and placed it in operation. To date, PAM has expended approximately \$125,000.00 to institute FM translator service to rebroadcast KIID(AM).

5. Gwyn did not object to the NIBC application. Rather, Gwyn filed an Informal Objection against the PAM application only; this was denied on October 3, 2018 (Exhibit B). Gwyn then filed a Petition for Reconsideration on October 15, 2018, which PAM opposed. Said Petition for Reconsideration was denied by Audio Division letter dated December 19, 2018 (Exhibit C). Gwyn then filed an Application for Review in January, 2019. PAM timely filed an Opposition, and those pleadings are pending before the Commission en banc.

6. Gwyn's arguments in its instant Petition for Reconsideration against the grant of the K290CT covering license at Elk Grove boil down to two: (a) that it was a violation of Section 74.1233(a)(1) for the Commission to accept and grant PAM's amendment to specify a transmitter site in the Elk Grove,

California area to effectuate a settlement with NIBC, where PAM's July 29, 1996 application had specified a transmitter site in the Granite Bay, California area; and (2) the Commission's grant of the above-captioned license application violates the Local Community Radio Act of 2010 (LCRA).

Gwyn Lacks Standing

7. The precedent in ***Center for International Media Action***, DA 18-729, 33 FCC Rcd 6733 (Audio Div., 2018) requires the FCC to dismiss to Gwyn "Petition for Reconsideration":

A petition for reconsideration, however, may only be filed by "any party to the proceeding, or any other person whose interests are adversely affected by any action taken by the Commission or by the designated authority" It is well established that participation in a proceeding as an informal objector does not confer standing to file a later petition for reconsideration Objectors are therefore not "parties to the proceeding" under Section 1.106(b), and they provide no evidence that they fall within any exception to this rule. [Footnotes omitted]

8. Gwyn filed an informal objection against PAM's application, File No. BPFT-20160279ALZ. He did not file an informal objection against the K290CT covering license application captioned above, but rather filed a "Petition for Reconsideration" after said application had been granted. Gwyn was never a "party to the proceeding"¹. Further, Gwyn has never explained how he has

¹Gwyn's residence is outside the K290CT 60 dBu contours at Elk Grove. Gwyn has never adequately proven that he resides within the K290CT primary service area and is an actual listener of K290CT. Thus, his claim of listener standing is defective. ***Tabback Broadcasting Co.***, 15 FCC Rcd 15899 (1999), citing ***Maumee Valley Broadcasting, Inc.***, 12 FCC Rcd 3487, 3488-89 (1997) as modified by ***CHET-5 Broadcasting, L.P.***, 14 FCC 13041 (1999).

been legally "aggrieved", that is, what exactly was the tangible economic injury he may have sustained due to the grant of the K290CT construction permit and license, nor has he sought a remedy which addresses any injury that he might have suffered.

9. Furthermore, Gwyn has no right of standing because he may have been "associated" with the Women's Civic Improvement Club of Sacramento, Inc. (WCIC), the erstwhile permittee of now deleted KWCS-LP. Just as an officer, director and/or individual stockholder of a corporate entity has no right to claim standing to assert rights that said corporation might have had, **Cherry v. FCC**, 641 F.3d 494 (D. C. Cir. 2011), an individual such as Gwyn has no individual standing to assert rights that WCIC, a non-profit corporation, might have had. In fact, so far as we know, Gwyn was never an officer or director of WCIC, and, pursuant to 47 C.F.R. §73.853(a), he was ineligible as an individual to be a licensee of a low power FM station. Therefore, Gwyn does not have standing to vindicate rights that were not his to begin with.

Gwyn's Petition Not Contemplated by 47 U.S.C. §309(c) (2) (C)

10. A petition to deny is not contemplated by 47 U.S.C. §309(c) (2) (C) against an application for a covering broadcast license. **Minnesota Christian Broadcasters, Inc.**, 22 FCC Rcd 4815 (Audio Div., 2007); **WBDC Broadcasting, Inc.**, 19 FCC Rcd 5288 (Audio Div., 2004). The procedures established by 47 U.S.C. §309(d) obligated Gwyn to bring all his arguments relative to the basic

qualifications of PAM in one petition to the FCC at the construction permit stage.

11. Gwyn did not raise the Section 74.1233(a)(1) issue in his Informal Objection while the PAM construction permit was still pending, even though that issue could have been thought of and formulated as the result of PAM's December 11, 2017 amendment. The facts were either known to Gwyn or ascertainable by him immediately after December 11, 2017, over two years ago. He cannot with a straight face assert that the contents of said PAM amendment were newly discovered facts.

12. With respect to the LCRA arguments, Gwyn and his confederates over at Prometheus Radio Project have objected to hundreds of 250-mile window cases based on their novel reading of LCRA. This is not a newly discovered nugget; they knew last year about LCRA, enacted in 2010, when Prometheus filed a blanket petition with the FCC to dismiss or deny these applications, including the PAM application. Furthermore, it appears that the Media Bureau has resolved the latest LCRA arguments against petitioners aligned with Gwyn in **Mega-Philadelphia, LLC**, 35 FCC Rcd --, DA20-126, released February 4, 2020 (see Exhibit D).

13. Gwyn attached to his instant Petition for Reconsideration a pleading dated August 19, 2019 by a Justin Howze styled "Petition for Reconsideration" against an application filed by Capstar TX, LLC for FM Translator Station K298DG, Modesto,

California. Gwyn neglected to tell the FCC that the Audio Division had denied the Howze petition by Letter Ruling, DA 19-1229, released December 4, 2019 (Exhibit E). To the extent that he is acting as an *alter ego* for Howze and/or Prometheus, Gwyn is collaterally estopped from raising in the instant K290CT case the arguments rejected by the Commission in the Howze/K298DG matter. **RKO General, Inc.**, 94 FCC 2d 890, 894-95 (1983). Furthermore, petitions for reconsideration are not to be used to reargue matters that the bureau disposed of in its original ruling. **Regents of the University of California**, 17 FCC Rcd 12891, 12892 (WTB 2002), citing **Mandeville Broadcasting Corp.**, 3 FCC Rcd 1667 (1988)) and **M&M Communications, Inc.**, 2 FCC Rcd 5100 (1987). Gwyn and Prometheus have separately unsuccessfully raised LCRA against PAM; they cannot be permitted to reargue it against the covering license application.

Conclusion

14. Gwyn's conduct presents the classic situation denounced by the appellate court in **Colorado Radio Corp. v. FCC**, 118 F.2d 24 (D. C. Cir. 1941), where an objector who raised certain issues before the agency in opposition to a broadcast application had those issues were rejected by the agency. After this rejection, the objector filed a subsequent pleading in which he raised new issues that could have raised at the initial stage of the proceeding if he had been cautious and had fully explored the facts

and the FCC rules. Turning to the instant case, the facts and the applicable law have not changed since Gwyn filed his initial "Informal Objection" against PAM. The **Colorado Radio** decision states (118 F.2d at 27):

Under these circumstances to allow the appellant to allege as an error or law a situation that it took no timely steps to correct by presenting its evidence in full would change its position from that of an interested party under the statute to that of a mere vigilante. As we said in the Red River case, 'The burden, therefore, is, and properly should be, upon an interested person to act affirmatively to protect himself. It is more reasonable to assume in this case a legislative intent that an interested person should be alert to protect his own interests than to assume that Congress intended the Commission to consider on its own motion the possible effect of its action in each case, upon every person who might possibly be affected thereby. Such a person should not be entitled to sit back and wait until all interested persons who do so act have been heard, and then complain that he has not been properly treated. To permit such a person to stand aside and speculate on the outcome; if adversely affected, come into this court for relief; and then permit the whole matter to be reopened in his behalf, would create an impossible situation. [footnote omitted]

See also **Red River Broadcasting Co. v FCC**, 98 F. 2d 282, 286-88 (D. C. Cir., 1938).

15. The Gwyn pleading is not in the public interest, because it would require the FCC to nullify the resolution of the mutual-exclusivity of the PAM and NIBC applications, and would deprive the public in the Sacramento radio market of two new compatible listening choices. It would also deprive PAM of the substantial money investment it has made in the new K290CT, which is now approximately \$125,000.00. The public interest, convenience and necessity demands that the Commission sustain the grant of the K290CT covering license.

WHEREFORE, it is urged that the Petition for Reconsideration filed by Charles Gwyn against the grant of the K290CT initial covering license application **BE DISMISSED OR DENIED.**

Respectfully submitted,

PUNJABI AMERICAN MEDIA, LLC



By _____
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Its Attorney

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DATED AND FILED: February 13, 2020

EXHIBIT A



**Federal Communications Commission
Washington, D.C. 20554**

August 24, 2018

In Reply Refer To:
1800B3-ATS

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In re: Women's Civic Improvement Club of Sacramento, Inc.

Station KWCS-LP, Sacramento, CA
Facility ID No. 192390
File No. BLL-20171219ADO

Petition for Reconsideration

Dear Mr. Gwyn and Counsel:

We have before us the Petition for Reconsideration (Petition) filed by Women's Civic Improvement Club of Sacramento, Inc. (WCICS), requesting reconsideration of the dismissal¹ of its license to cover application (License Application) for Station KWCS-LP, Sacramento, California (Station).² For the reasons set forth, we deny the Petition.

Background. The Media Bureau (Bureau) issued WCICS a construction permit (Permit) for the Station on December 8, 2014, with an expiration date of December 8, 2017.³ No license to cover application was filed by December 8, 2017, and on December 12, 2017, the Bureau cancelled the Permit in the Commission's electronic database, CDBS, and deleted the Station's call sign.

¹ *Broadcast Actions*, Public Notice, Report No. 49220 (MB Apr. 23, 2018) (*Dismissal PN*).

² WCICS filed the Petition on May 22, 2018. Punjabi America Media, LLC (PAM), filed an Opposition on June 1, 2018. New Inspiration Broadcasting Company, Inc. (NIBC), filed a pleading styled "Comments in Support of Punjabi American, LLC's Opposition to Petition for Reconsideration" on June 6, 2018. PAM is the assignee of the license of FM Translator Station K227AH, River Pines, California. See File No. BALFT-20160729ALB. PAM filed an application to modify K227AH, which is mutually exclusive with an application filed by NIBC to modify FM Translator Station K245AR, Little Fish Lake Val, California. See File Nos. BPFT-20160729ALZ, BPFT-20160729ANB. PAM filed an amendment to its modification application which proposes to resolve this mutually exclusively by specifying operation on the same channel as KWCS-LP.

³ See File No. BNPL-20131104AUY (Permit Application). WCICS filed an application to modify the Permit by specifying operation on a different channel. See File No. BMPL-20160711ABR. The Bureau granted this application on July 18, 2016.

WCICS filed the License Application on December 19, 2017, certifying that the facility had been constructed in accordance with the terms of the Permit.⁴ That same day, the Bureau reinstated the Permit and the Station's callsign.⁵ PAM filed an Informal Objection to the License Application on December 20, 2017 (Objection), and a Supplement to the Objection on January 18, 2018 (Objection Supplement).⁶ On April 18, 2018, the Bureau dismissed the License Application pursuant to Section 73.3598 of the FCC's rules (Rules) because it was filed after the Permit had expired.⁷

In the Petition, WCICS argues that the Station was timely constructed on December 7, 2017, in accordance with the Permit.⁸ It explains that it is "not a seasoned broadcast entity" and was not sure how to inform the Commission that the Station had commenced operations.⁹ WCICS notes that the Commission has a policy to accept covering license applications filed after the expiration of the underlying construction permit,¹⁰ and argues that it has met the requirements of this policy because the Station was built on time and WCICS has proven that it was in fact timely constructed.¹¹

The Petition is accompanied by a Declaration of Charles Gwyn. Gwyn states that he constructed and operated the Station until the License Application was dismissed.¹² Gwyn further states that the Station was constructed and commenced broadcasting on December 7, 2017, at the WCICS headquarters at 3555 3rd Ave, Sacramento, California, and provides a picture of what he claims is that tower.¹³ Gwyn also notes—for the first time—that although the Permit authorized an antenna height of 31 meters,¹⁴ the antenna was built at 16.8 meters, but argues that the Station still complies with the minimum requirements of Section 73.811(b) of the Rules.¹⁵ Finally, Gwyn states that "[w]hen the [License Application] was canceled, the station stopped transmitting."¹⁶

Discussion. The Commission will consider a petition for reconsideration only when the petitioner shows either a material error in the Commission's original order or raises additional facts not known or existing at the time of the petitioner's last opportunity to present such matters.¹⁷ WCICS has failed to meet this burden.

⁴ License Application at Section III, Question 2.

⁵ *Broadcast Applications*, Public Notice, Report No. 29138 (MB Dec. 22, 2017).

⁶ The Bureau did not address either the Objection or the Objection Supplement in the *Dismissal PN*.

⁷ See *Dismissal PN* ("Dismissed 4/18/2018 per 47 CFR Section 73.3598. The original permit BNPL-20131104AUY, as modified by BMPL-20160711ABR, expired on 12/08/2017. No letter sent."); 47 CFR § 73.3598.

⁸ Petition at 1.

⁹ *Id.*

¹⁰ *Id.* at 2 (citing *WKLC, Inc.*, Memorandum Opinion and Order, 28 FCC Rcd 2061 (MB 2013) (*WKLC*)).

¹¹ Petition at 2-3.

¹² Petition at Gwyn Declaration. Although we note that PAM has raised procedural objections to the Petition (Opposition at 3), we need not address those in light of our disposition here.

¹³ *Id.*

¹⁴ Permit Application at Section VI, Question 6.

¹⁵ Petition at Gwyn Declaration (citing 47 CFR § 73.811(b)).

¹⁶ Petition at Gwyn Declaration.

¹⁷ 47 CFR § 1.106(c); *WWIZ, Inc.*, Memorandum Opinion and Order, 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*, 397 U.S. 967 (1966); *Davis & Elkins Coll.*, Memorandum and Order, 26 FCC Rcd 15555, 15556, para. 5 (MB 2011).

Under our precedent, “we will only waive the automatic expiration provision of Section 73.3598(e) and accept a late-filed covering license application where: (1) the permittee demonstrates conclusively that construction in accordance with the construction permit was complete and the station was ‘ready for operation’ by the permit expiration date; and (2) the covering license application is filed within 30 days of the expiration date.”¹⁸ WCICS failed to meet this standard because it did not conclusively demonstrate when it filed the License Application that the Station was timely constructed in accordance with the Permit; in fact, the License Application contained no documentation at all showing that the Station had been timely constructed in accordance with the Permit. The Petition likewise fails to meet this standard. The lone undated photograph WCICS provided, of an unidentified communications tower in an unidentified location, fails to demonstrate that the Station was built in accordance with the Permit by December 7, 2017.¹⁹ Accordingly, we deny the Petition.²⁰

Moreover, assuming the Station was constructed, the Petition concedes that it was not constructed in accordance with the Permit.²¹ WCICS states in the Petition that the Station’s antenna was constructed at a height of 16.8 meters above ground level when it was authorized at a height of 31 meters, a difference of 14.2 meters below the authorized height.²² Section 73.875(b)(3) of the Rules provides that an LPFM station may not modify its antenna height by more than 2 meters above or 4 meters below its authorized value without prior approval by the Commission.²³ WCICS’s modification occurred without the required approval from the Commission. We have deemed a construction permit expired where the permittee constructed the facility at a variance from the underlying permit.²⁴ WCICS’s failure to construct the facility in accordance with the Permit would serve as separate and independent basis to dismiss the License Application, even if WCICS had made a showing that the Station’s construction was complete before the Permit expired.²⁵

¹⁸ *WKLC*, 28 FCC Rcd at 2064, para. 9. The Bureau adopted this processing policy following the decision in *Clear Channel Broadcasting Licenses, Inc.*, where the Commission affirmed the Bureau’s policy of waiving Section 73.3598 and accepting a covering license application filed within a few days of the expiration of the underlying construction permit. *Clear Channel Broadcasting Licenses, Inc.*, Memorandum Opinion and Order, 26 FCC Rcd 7153, 7157, para. 10 (2011). We note that Section 73.3598 applies to the Station by virtue of 47 CFR § 73.801.

¹⁹ For example, WCICS could have provided station logs, equipment receipts, invoices from contractors, payment records, or other documentation proving the Station was timely constructed.

²⁰ In light of our finding that the Bureau properly dismissed the License Application, we need not address the numerous issues PAM raised in the Objection, Objection Supplement, and Opposition.

²¹ We note that PAM presented a detailed showing in the Objection Supplement to support a claim that the Station was not constructed in the location authorized by the Permit as of January 11, 2018. See Objection Supplement at 2-5. WCICS never attempted to rebut that claim and asserted in the Petition that the Station operated until the License Application was dismissed. Petition at Gwyn Declaration. However, we need not address it in light of our disposition here.

²² Petition at Gwyn Declaration; see FCC File No. BMPL-20160711ABR.

²³ 47 CFR § 73.875(b)(3).

²⁴ See, e.g. *Centro Cristiana Vida Abundante*, Letter Order, 32 FCC Rcd 10072 (MB 2017) (finding that construction permit has expired where permittee modified facility without authority and thus did not timely build facility as authorized).

²⁵ We reject WCICS’s argument that the License Application should be accepted because the facility it constructed, even with the reduced antenna height, nonetheless provides the minimum coverage required under Section 73.811(b). We have held that “[e]xcept to the extent specifically provided in our Rules, we do not allow permittees to self-approve modifications to their construction permits.” *Great Lakes Community Broadcasting, Inc.*, Memorandum Opinion and Order, 24 FCC Rcd 8239, 8244 n.24 (MB 2009) (“Commission review and prior approval of engineering changes are necessary prior to construction. The Commission operates a national database of authorizations that allows all parties to know where and when broadcast spectrum is available. In an era of intense

Conclusion. Accordingly, for the reasons discussed above, IT IS ORDERED that the Petition for Reconsideration filed on May 22, 2018 by Women's Civic Improvement Club of Sacramento, Inc., IS DENIED.

Sincerely,



Albert Shuldiner
Chief, Audio Division
Media Bureau

demand for broadcast spectrum, parties . . . cause substantial harm when they hoard spectrum by holding authorizations . . . but operate minimal facilities that would not have been approved under our Rules had they been presented to us (or, worse, fail to operate any facilities)."). Indeed, here, WCICS's inaction has precluded the Bureau from processing several applications filed by PAM and NIBC. *See supra* n.2.

EXHIBIT B



Public Notice Comment

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Public Notice Comment

BPFT- Minor change in licensed facilities, callsign K227AH.
20160729ALZ Engineering Amendment filed 08/01/2016
Engineering Amendment filed 09/23/2016

Informal Objection filed 05/16/2018 by PROMETHEUS ET. AL.
Engineering Amendment filed 12/11/2017

Informal Objection filed 09/24/2018 by CHARLES GWYN

Opposition Informal Objection filed 10/02/2018 by PUNJABI AMERICAN MEDIA, LLC

The Informal Objection filed 9/24/2018 by Charles Gwyn IS HEREBY DENIED 10/03/2018 via Public Notice. No letter sent. Objector fails to demonstrate that grant of this application would violate any Commission rule or policy. The Objector claims that the proposal is in conflict with the Local Community Radio Act (LCRA), and that the application proposes a prohibited major change. We note that modification applications do not constitute applications for "new FM translator stations," under the language of Section 5 of the LCRA. See DA 18-597. Furthermore, changes in the Community of License for a translator facility are considered minor and can be performed at any time.

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EXHIBIT C



**Federal Communications Commission
Washington, D.C. 20554**

December 19, 2018

*In Reply Refer to:
1800B3-HOD*

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**In re: Family Stations, Inc.
Punjabi America Media, LLC**

K227AH, River Pines, California
Facility ID No. 85824
File No. BALFT-20160729ALB

Punjabi America Media, LLC

K227AH, River Pines, California
Facility ID No. 85824
File No. BPFT-20160729ALZ

Petitions for Reconsideration

Dear Petitioners and Counsel:

We have before us a Petition for Reconsideration (Gwyn Petition) filed by Charles Gwyn (Gwyn) on October 15, 2018. Gwyn challenges the dismissal of his Informal Objection to the above-captioned applications for consent to the assignment of license and modification of station license and our grant of those applications. Also before us is a Petition for Reconsideration (Dandridge Petition) filed by Pierce Dandridge (Dandridge) on November 1, 2018. Dandridge challenges only our grant of the application for modification of station license—filed by Punjabi America Media, LLC (PAM)—to change the frequency and community of license of K227AH, River Pines, California (Station). For the reasons set forth below, we dismiss both the Gwyn and Dandridge Petitions.

Background. On July 29, 2016, Family Stations, Inc. (FSI) and PAM filed an application (Assignment Application) for consent to the assignment of the license for K227AH, River Pines, California (Station), from FSI to PAM. That same day, during a filing window opened as part of the Commission’s AM revitalization efforts,¹ PAM filed a contingent application (Application) to move the Station from Channel 227 to Channel 290 and from River Pines to Granite Bay, California. PAM subsequently amended the Application to specify Channel 289 and Elk Grove, California.² However, the amended application conflicted with another application filed during the same filing window. Thus, when Channel 290 became available due to the expiration of a construction permit for an LPFM station operating on that channel, PAM amended the Application to propose operation on Channel 290 at Elk Grove.³

Nine months later, on September 24, 2018, Gwyn filed an Informal Objection to the Application. Therein, he argued that the application conflicted with the Local Community Radio Act of 2010 (LCRA). He also questioned how PAM could “authorize and file” applications related to the Station. FSI and PAM filed a Joint Opposition to Informal Objection on October 2, 2018. We denied the Informal Objection and granted the Assignment Application and the Application on October 3, 2018.⁴

Gwyn filed the Gwyn Petition on October 15, 2018. Therein, he repeats his argument that the Application conflicts with the LCRA.⁵ He also argues that there was an unauthorized transfer of control of the Station to PAM and cites PAM’s filing of the Application in support of this claim.⁶ Gwyn asks us to rescind our grants of the Assignment Application and the Application.⁷ FSI and PAM filed a Joint Opposition to Petition for Reconsideration (Gwyn Opposition) on October 30, 2018. Among other things, they argue that Gwyn lacks standing.⁸ Gwyn filed a Reply to Objection (Gwyn Reply) on November 5, 2018.

Dandridge filed the Dandridge Petition on November 1, 2018. He too argues that the Application conflicts with the LCRA.⁹ Much of the text of the Dandridge Petition is pulled verbatim from the Informal Objection and the Gwyn Petition. FSI and PAM filed a Joint Opposition to Petition for

¹ *Media Bureau Announces Filing Dates and Procedures for AM Station Filing Window for FM Translator Modifications and Availability of FM Translator Technical Tools*, Public Notice, 30 FCC Rcd 14690 (MB 2015).

² PAM filed this amendment on September 23, 2016.

³ PAM filed this most recent amendment on December 11, 2017. As there was no application for a license to cover the permit for Channel 290 on file at that time and the LPFM station’s construction permit specified an expiration date of December 8, 2017, File No. BNPL-20131104AUY, staff cancelled the permit. In response, Women’s Civic Improvement Club of Sacramento, Inc. (WCICS)—the permittee—filed a license application. See File No. BLL-20171219ADO. The Bureau later dismissed the license application. *Broadcast Actions*, Public Notice, Report No. 49220 (MB Apr. 23, 2018). WCICS then filed a petition for reconsideration of the dismissal, which the Commission denied on August 24, 2018. *Women’s Civic Improvement Club of Sacramento, Inc.*, Letter Order (MB Aug. 24, 2018). Gwyn asserts that he “was associated with” WCICS. Petition at 2. He appears to have filed the Gwyn Petition in response to the Bureau’s action on the WCICS petition for reconsideration.

⁴ *Broadcast Actions*, Public Notice, Report No. 493378 (MB Oct. 9, 2018) (“noting that modification applications do not constitute applications for “new FM translator stations,” under the language of Section 5 of the LCRA” and that “changes in the Community of License for a translator facility are considered minor and can be performed at any time.”).

⁵ Gwyn Petition at 4-7.

⁶ *Id.* at 3-4.

⁷ *Id.* at 7.

⁸ Gwyn Opposition at 2-4.

⁹ Dandridge Petition at 3-7.

Reconsideration (Dandridge Opposition) on November 14, 2018. Among other things, they assert that Dandridge lacks standing.¹⁰ Dandridge filed a Reply to Objection (Gwyn Reply) on November 21, 2018.

Discussion. Section 1.106(b)(1) of the Commission’s rules permits “any party to a proceeding, or any other person whose interests are adversely affected” to file a petition for reconsideration.¹¹ If a petition for reconsideration is filed by a non-party, however, the non-party must “state with particularity the manner in which the [petitioner’s] interests are adversely affected” and “show good reason why it was not possible … to participate in the earlier stages of the proceeding.”¹² To show that it is “adversely affected” by an action, a petitioner must demonstrate a direct causal link between the challenged action and the alleged injury to the applicant, and show that the injury would be prevented or redressed by the relief requested.¹³ In the broadcast regulatory context, petitioners generally show this by demonstrating that they are: (1) a competitor in the market suffering signal interference; (2) a competitor in the market suffering economic harm; or (3) a resident of the station’s service area or regular listener of the station.¹⁴

We conclude that Gwyn lacks standing to seek reconsideration of our grant of the Assignment Application. Gwyn did not participate in the Commission’s initial consideration of the Assignment Application. Thus, Gwyn is not a party to the proceeding. Gwyn, therefore, must show how his “interests are adversely affected” and “good reason” why he could not participate earlier.¹⁵ Gwyn, however, has not explained why he did not participate prior to grant of the Assignment Application.¹⁶ Accordingly, he lacks standing to seek reconsideration of that grant and we dismiss the portion of the Gwyn Petition that challenges the Bureau’s grant of the Assignment Application.

We further find that Gwyn lacks standing to seek reconsideration of our grant of the Application. Gwyn is not a party to the proceeding, having filed only an Informal Objection to the Application.¹⁷ As a non-party, he must demonstrate that he is “adversely affected” by grant of the Application.¹⁸ Gwyn does not claim he is a resident of the station’s current or proposed service area or a listener of the station.¹⁹ Nor does he claim to be a competitor in the market. Instead, Gwyn argues that he “is adversely affected

¹⁰ Dandridge Opposition at 2-4.

¹¹ 47 CFR § 1.106(b)(1).

¹² *Id.*

¹³ *Entercom Sacramento Licenses, LLC*, Order on Reconsideration, FCC 18-151, para. 3 (Oct. 25, 2018) (recon. pending) (*Entercom Sacramento Renewal*).

¹⁴ See *Chet-5 Broad., L.P.*, Memorandum Opinion and Order, 14 FCC Rcd 13041, 13042, para. 3 (1999) (“[W]e will accord party-in-interest status to a petitioner who demonstrates either residence in the station’s service area or that the petitioner listens to or views the station regularly, and that such listening or viewing is not the result of transient contacts with the station.”); *Northern Pacific Radio Corp.*, Memorandum Opinion and Order, 44 FCC 2848, 2851, para. 12 (1962) (stating “[i]n order to have standing to petition for reconsideration …, petitioner must show that he is a ‘person aggrieved or whose interests are adversely affected’” and noting that this statutory language was “synonymous” with the term “party, in interest” and that “the same showing is required in each instance”).

¹⁵ 47 CFR 1.106(b)(1).

¹⁶ While the Assignment Application is mentioned in Gwyn’s Informal Objection to the Application, Gwyn objected only to the Application therein. In any event, the filing of an Informal Objection does not confer party status upon the objector. See, e.g., *Entercom Sacramento Renewal*, para. 3; *Montgomery County Broad. Corp.*, Memorandum Opinion and Order, 65 FCC 2d 876, 877 n.2 (1977).

¹⁷ *Id.*

¹⁸ 47 CFR § 1.106(b)(1).

¹⁹ Gwyn Reply at 3 (“It would not make sense for the Petitioner to state he was a listener …”). In the Petition, though, Gwyn stated he “is a resident of Sacramento.” Gwyn Petition at 2. As FSI and PAM point out, though, he does not reside within the existing or proposed service area of the Station. Gwyn Opposition at 3.

by the loss of a Sacramento LPFM channel.”²⁰ According to Gwyn, Channel 290 is the only channel available for LPFM use in Sacramento.²¹ However, even assuming this to be the case, Gwyn does not assert that he is affiliated with an organization that wishes to apply for a construction permit for a new LPFM station serving the Sacramento area,²² nor is there any basis to assume such an application would be successful if filed.²³ Thus, Gwyn has failed to show how this loss would injure him in a “direct, tangible and substantive nature.”²⁴ In any event, as the Commission has noted, “standing is not conferred on a person that lacks current harm, even if such person alleges potential future harm.”²⁵ Gwyn has failed to show how he is adversely affected by our grant of the Application.²⁶ Accordingly, we find he lacks standing to challenge that action and dismiss the remainder of the Gwyn Petition.

We also determine that Dandridge lacks standing to seek reconsideration of our grant of the Application.²⁷ Dandridge is not a party to the proceeding, having filed no objection to the Application prior to its grant. As a non-party, he must show “good reason why it was not possible ... to participate in the earlier stages of the proceeding.”²⁸ He argues that his failure to participate earlier is excused by the fact that the change proposed in the application is, “by definition,” a major change subject to the local public notice requirements set forth in the Commission’s rules. Dandridge ignores the fact that, as an application filed during an AM revitalization filing window, the Application is classified as a minor modification application.²⁹ Further, as Dandridge acknowledges, the Application—and subsequent amendments to the application—were included in public notices of broadcast applications accepted for filing.³⁰ Thus, while public notice of the Application was not required to be published in a local

²⁰ Gwyn Petition at 3; Gwyn Reply at 3.

²¹ Gwyn Petition at n. 10.

²² Gwyn himself could not apply for a construction permit for an LPFM station because individuals are not eligible to hold LPFM station licenses. *See* 47 CFR § 73.853(a) (providing that an LPFM station may be licensed only to: (1) nonprofit educational organizations, (2) state and local governments and non-government entities, or (3) Tribal Applicants).

²³ As noted, *supra* note 3, Gwyn states that he was associated with WCICS. However, he was not listed by WCICS as a party to the permit application. In any event, WCICS chose not to challenge the Bureau’s denial of its petition for reconsideration of the dismissal of its license application for the LPFM station.

²⁴ *Entercom Sacramento Licenses, LLC*, Letter Order, 32 FCC Rcd 6880, 6883 (2017) (subsequent history omitted) (noting that a petitioner for reconsideration must “demonstrate standing as a regular listener, or some other injury of a direct, tangible or substantial nature”). *See also Urbanmedia One*, Memorandum Opinion and Order, 31 FCC Rcd 13759, 13760, para. 4 (2016) (noting that the Commission accords party-in-interest status where a filer demonstrates: “(1) harm of a direct, tangible, or substantial nature; (2) residence in the service area of the subject station; or (3) regular listenership to the station which is not the result of transient contacts.”).

²⁵ *Urbanmedia One*, Order on Reconsideration, 32 FCC Rcd 5264, 5268, para. 6 (2017).

²⁶ Because we find that Gwyn has not demonstrated he is adversely affected, we need not—and do not—reach his other arguments that he participated earlier in the proceeding or alternatively that there was good cause for his failure to participate earlier. Gwyn Petition at 2; Gwyn Reply at 4.

²⁷ The captions to the Dandridge Petition and Dandridge Reply list the file numbers for both the Application and the Assignment Application. However, the text of the pleadings indicates they are “regarding modification of translator K227AH.” Accordingly, we conclude that the Dandridge Petition relates only to the Application.

²⁸ 47 CFR § 1.106(b)(1).

²⁹ *Revitalization of the AM Service*, First Report and Order, Further Notice of Proposed Rulemaking, and Notice of Inquiry, 30 FCC Rcd 12145, 12152, para. 15 (2015) (*AM Revitalization Order*) (In establishing this filing window, the Commission stated that “an AM licensee or permittee seeking to rebroadcast on an FM translator may acquire and relocate one ... authorized non-reserved band FM translator up to 250 miles, and specify any rule-compliant non-reserved band FM channel as a minor modification application, notwithstanding Section 74.1233(a)(1) of our Rules, which defines major and minor modifications of FM translator facilities.”).

³⁰ Dandridge states that “because there was never a clear public notice to demonstrate a new station was to occupy a new frequency in the Sacramento vicinity,” this constitutes “good reason” for his failure to participate earlier.

newspaper, there was public notice of the Application.³¹ Lastly, we reject Dandridge's assertion that it would have been "redundant" for him to file an objection to the Application because Gwyn had already filed a pleading raising the same concern.³² It is axiomatic that an adjudicatory process cannot operate efficiently or accurately if a party does not participate in a proceeding but is permitted to "sit back and hope that a decision will be in its favor."³³ Dandridge has failed to show good cause for his failure to participate earlier in this proceeding.³⁴ Accordingly, we find that he lacks standing to file the Dandridge Petition and dismiss it herein.

Dandridge Petition at 2; Dandridge Reply at 2-3. We note that the Commission considered the issue of notice in deciding to designate applications filed during the AM revitalization windows as minor modifications. *AM Revitalization Order*, 30 FCC Rcd at 12151, para. 14 (discussing waivers of Section 74.1233(a)(1) of the Rules to permit the filing of a minor modification application for proposed changes that would otherwise require filing of a major change application, noting a request to waive Section 74.1233(a)(1) where the licensed and proposed translator facility were within the proposed AM primary station's 0.25 mV/m interfering contour but not mutually exclusive, acknowledging that the Bureau had expressed concern that granting such a waiver would not "give appropriate notice to, or protect, potential mutually exclusive applicants" and noting that the Commission would not extend the existing policy regarding waivers of Section 74.1233(a)(1) except "for the limited purpose of the modification window" in which PAM filed the Minor Modification Application).

³¹ While Dandridge and FSI and PAM engage in some back and forth about how much time Dandridge had to file an objection to the Application (Dandridge Opposition at 4; Dandridge Reply at 2-3), we note that the most recent amendment was filed on December 11, 2017, almost ten months before the Bureau acted on the Application. This is not a case where prompt staff action "effectively preclude[d] participation during the initial consideration of an application." See, e.g., *KSCO, Santa Cruz, CA*, Letter Order, 29 FCC Rcd 9606, 9607 (MB 2014) (finding petitioner for reconsideration lacked standing where it had more than 90 days to object to application at issue but did not do so); *Channel 23 Ltd. P'ship*, Memorandum Opinion and Order, 29 FCC Rcd 15073, 15075-76, para. 5 (2014) (affirming staff's finding that the petitioner "had ample opportunity to file an informal objection during the four months between the Commission's Public Notice accepting the Modification Application and its grant"); *Davidson County Broad. Co., Inc.*, Memorandum Opinion and Order, 8 FCC Rcd 1689, 1690 (1993) (finding that petitioner for reconsideration lacked standing where it had four months to file informal objection to application at issue but did not do so).

³² Dandridge Petition at 2-3.

³³ See, e.g., *Canyon Area Residents for the Environment*, Memorandum Opinion and Order, 14 FCC Rcd 8152, 8154, para. 7 (1999), quoting *Colorado Radio Corp. v. FCC*, 118 F.2d 24, 26 (D.C. Cir. 1941).

³⁴ Because we find that Dandridge has not demonstrated good cause for his failure to participate earlier, we need not—and do not—reach his arguments that his interests are adversely affected. Dandridge Petition at 3; Dandridge Reply at 1-2.

Conclusion/Ordering Clauses. Accordingly, for the reasons set forth above, IT IS ORDERED that the Petition for Reconsideration filed by Charles Gwyn on October 15, 2018, IS DISMISSED. IT IS FURTHER ORDERED that the Petition for Reconsideration filed by Pierce Dandridge on November 1, 2018, IS DISMISSED.

Sincerely,

A handwritten signature in blue ink, appearing to read "Albert Shuldiner".

Albert Shuldiner
Chief, Audio Division
Media Bureau

EXHIBIT D



**Federal Communications Commission
Washington, D.C. 20554**

**DA 20-126
Released: February 4, 2020**

In Reply Refer To:
1800B3-TSN

Prometheus Radio Project
P.O. Box 42158
Philadelphia, PA 19101

Mega-Philadelphia LLC
535 Route 38 East
Cherry Hill, NJ 08002

In re: Mega-Philadelphia LLC
W239DS, Camden, New Jersey
Facility ID No. 202134
File No. BNPFT-20180508ABL

Petition for Reconsideration

Dear Petitioner and Applicant:

Prometheus Radio Project (Petitioner) has filed a Petition for Reconsideration (Petition) of the Media Bureau's (Bureau) June 8, 2018, *Letter Decision* dismissing, and alternatively denying, an informal objection (Objection) filed against the referenced application.¹ Petitioner, along with the two other objectors, sought reconsideration of the *Letter Decision*.² In the Petition that remains before us, Paul Bame, who signed the informal objection and petition for reconsideration on behalf of Petitioner, established sufficient standing on Petitioner's behalf to maintain a petition for reconsideration of our denial of the informal objection as to Mega-Philadelphia LLC's (MPL) application for a new cross-service FM translator for W239DS at Camden, New Jersey.³ We thus consider the Petition on its merits and, as discussed below, deny the Petition.

¹ *Center for International Media Action; Common Frequency, Inc.; Prometheus Radio Project*, Letter Decision, 33 FCC Rcd 5394 (MB 2018) (*Letter Decision*). Petitioner, Center for International Media Action, and Common Frequency, Inc. filed informal objections against a total of 994 pending translator applications, including the application for W239DS. The *Letter Decision* dismissed and denied all those objections.

² The objectors filed Petitions for Reconsideration involving 328 of the 994 translator stations that were the subject of the informal objections. In a letter dated July 12, 2018, the Media Bureau dismissed all of the petitions for reconsideration, except for the petition filed against W239DS, on the ground that the petitions lacked standing. *Center for International Media Action; Common Frequency, Inc.; Prometheus Radio Project*, Letter Decision, 33 FCC Rcd 6733 (MB 2018) (*July Reconsideration Decision*).

³ File No. BNPFT-20180508ABL (Camden Application).

Background. In the informal objection, Petitioner argued that the Camden Application did not ensure filing opportunities for low-power FM (LPFM) stations, pursuant to Section 5 of the Local Community Radio Act of 2010.⁴ The Bureau dismissed the informal objection for failing to allege properly supported facts that, if true, would establish a substantial and material question of fact that grant of the application would be inconsistent with the public interest.⁵ Alternatively, the Bureau denied the objection on various substantive grounds.⁶

In the Petition, Petitioner states that the grounds for denial of the objections were arbitrary and capricious, and were not consonant with the dictates of Section 5 of LCRA (Section 5). In substantial part Petitioner contends that the extensive safeguards implemented in FM Translator Auction 83 to preserve secondary service spectrum for LPFM stations must be used in all subsequent secondary service windows. It further argues that because the Commission has used such mechanisms in other contexts, specifically the so-called Mattoon Waiver, it must use it in all contexts involving licensing FM translator stations. Petitioner also questions the staff's contention that the structural limits of Auction 100, namely those limiting new fill-in translator stations to one per AM station, were not sufficient to meet the requirements of Section 5, as application caps were found insufficient in Auction 83.

Discussion. The Commission will consider a petition for reconsideration only when the petitioner shows either a material error in the Commission's original order or raises new facts or changed circumstances not known or existing at the time of the petitioner's last opportunity to present such matters.⁷ We find that Petitioner has not met this burden.

The gravamen of the Petition is that the Camden Application does not comport with the dictates of Section 5, in that it proposes a new translator that could impede a potential move of existing LPFM station WPPM-LP to the northwest, and thus that the Camden Application is not compliant with the LCRA. As discussed below, we find that the Camden Application conformed to the procedures established for Auction 100, and further that the Auction 100 procedures comport with Section 5.

Petitioner essentially repeats its assertions in the original informal objection, namely, that MPL did not demonstrate that grant of its application would leave sufficient spectrum in the Camden market for future LPFM licensing. Section 5 by its terms requires that, when licensing new FM translators, boosters, or LPFM stations, the Commission must ensure: (1) that licenses are available to FM translator stations, LPFM stations, and FM booster stations; (2) that licensing decisions are made based on the needs of the local community; and (3) that FM translator stations, LPFM stations, and FM booster stations remain equal in status and secondary to existing and modified full-service FM stations.

Petitioner contends that Section 5 requires us to continue using what we termed the "extraordinary *ad hoc* processing measures" the Commission established in the context of disposing of over 13,000 new translator applications filed in Auction 83, while preserving sufficient spectrum to open

⁴ Pub. L. 111-371, 124 Stat. 4072 (2011) (LCRA). *See* Objection at 8-13. Although the informal objections were filed against all 994 FM translator applications that were pending as of the May 16, 2018, filing date of the objections, we limit our discussion herein to the arguments as they apply to the Camden Application.

⁵ *Letter Decision* at 2-3. The Bureau also dismissed the informal objections against translator applications that had been previously granted or dismissed as well as those directed at applications for modification of translator licenses.

⁶ *Id.* at 3-6.

⁷ 47 CFR § 1.106(c); *WWIZ, Inc.*, Memorandum Opinion and Order, 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*, 397 U.S. 967 (1966); *Davis & Elkins Coll.*, Memorandum and Order, 26 FCC Rcd 15555, 15556, para. 5 (MB 2011).

a subsequent LPFM window.⁸ It is useful to note, however, that neither the processing measures adopted in the *LPFM Fourth R&O* nor those adopted in the subsequent *AMR First R&O*, although both subjected to notice-and-comment rulemaking procedures, were codified. This is because neither set of procedures was considered to be of general applicability in applying the dictates of Section 5 to all new secondary service licensing. Rather, the Commission must devise different procedures for each secondary service filing window, that are responsive to the unique circumstances and public interest considerations underlying that particular filing opportunity.

In the case of Auction 83, 13,377 new FM translator applications were freely filed by any party wishing to do so, without restriction on the number of applications filed by any one applicant, the location of the proposed translator(s), or the alienability of the ultimately granted authorization.⁹ Grant of all or most of these applications would have severely depleted spectrum available to other secondary services, including LPFM. By 2011, eight years after the Auction 83 window opened, Congress enacted the LCRA, to guard against such spectrum depletion. Thus, faced with an unprecedented volume of translator applications filed in the general Auction 83 window, the Commission introduced extraordinary remedial measures, including limiting the number of filed applications that applicants could continue to prosecute, and requiring applicant-filed preclusion studies, all to preserve spectrum for future LPFM stations.¹⁰ As discussed below, however, Auction 100 was designed to limit the number of new translator applications so as to avoid the extreme volume of applications filed in Auction 83, thus the extraordinary remedial measures employed in that auction were not required.

As a result of the severe remedial restrictions placed on Auction 83 applicants, 5,450 new translator permits were awarded, out of 13,377 applications filed. The measures taken to winnow the number of successful Auction 83 applications enabled the October-November 2013 LPFM filing window,¹¹ in which 1,994 out of a total of 2,827 new LPFM station applications filed were granted.

In 2013, the Commission initiated the *AM Revitalization* proceeding.¹² The Commission observed that listenership of AM stations—the earliest broadcast service—had decreased due to various factors, including the availability of higher-fidelity listening options, inter-station interference, and environmental interference (e.g., computers, LED bulbs, etc.).¹³ Notwithstanding the decline in listenership, the Commission stressed the importance of AM stations to the communities they serve:

⁸ *Letter Decision*, 33 FCC Rcd at 5396, citing *Media Bureau Announces January 10 - January 25, 2013 Filing Window for Auction 83 FM Translator Application Selections and Caps Showings*, Public Notice, 27 FCC Rcd 15961 (MB 2012) (*Cap Public Notice*); *Media Bureau Offers Examples to Clarify Auction 83 FM Translator Application Selections and Cap Showings Requirements*, Public Notice, 28 FCC Rcd 98 (MB 2013). See also *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*).

⁹ See *Creation of a Low Power Radio Service*, Fifth Order on Reconsideration and Sixth Report and Order, 27 FCC Rcd 15402, 15404, para. 4 (2012) (*LPFM Sixth R&O*) (noting that 40 percent of FM translator permits initially awarded in Auction 83 window were assigned to non-applicants, and that co-owned filers of the largest number of applications sought to assign more than 50 percent of the construction permits they received).

¹⁰ See generally *LPFM Fourth R&O*, 27 FCC Rcd at 3382-88, paras. 38-49; *LPFM Fifth R&O*, 27 FCC Rcd at 15404-07, paras. 4-13 (discussing need for application caps).

¹¹ See, e.g., *Media Bureau Announces Availability of the Revised FCC Form 318 and the Filing Procedures for October 15 – October 29, 2013, Low Power FM Filing Window*, Public Notice, 28 FCC Rcd 8854 (MB 2013).

¹² *Revitalization of the AM Radio Service*, Notice of Proposed Rule Making, 28 FCC Rcd 15221 (2013) (*AMR NPRM*).

¹³ *Id.* at 15222-23, paras. 4-6.

Today, AM radio remains an important source of broadcast entertainment and information programming, particularly for locally oriented content. AM broadcasters provide unique, community-based programming to distinguish themselves from other media sources in an increasingly competitive mass media market. (citation omitted) For example, all-news/talk, all-sports, foreign language, and religious programming formats are common on the AM band. Indeed, over 90 percent of all news/talk stations operate on the AM band. (citation omitted) Local programming is also prevalent on the AM dial, including discussions of local news, politics and public affairs, traffic announcements, and coverage of community events such as high school athletic contests.¹⁴

Thus, in the *AMR NPRM*, the Commission emphasized not just the value of AM programming generally, but specifically the value of such programming to the local communities served by AM stations. It then proposed several measures designed to revitalize the AM band generally and to assist existing AM broadcasters specifically. The latter category included a proposal to open a filing window during which AM station licensees could apply for a fill-in cross-service FM translator, with a cap of one translator application per AM station. Each such translator would be permanently linked to the AM primary station that it rebroadcast—the proposed translator could not be assigned or transferred except in conjunction with the AM primary station that licensed it. The Commission sought comment as to the effect of such a window on other services, including LPFM,¹⁵ and specifically noted its belief that “a narrowly tailored filing window for such FM translators, as proposed above, could yield significant public interest benefits with little to no detriment either to the FM translator service or to licensing opportunities for LPFM stations, especially since the filing window proposed here will follow the 2013 LPFM filing window.”¹⁶ Thus, the Commission not only considered the effect of the *AM Revitalization* windows on other secondary services such as LPFM, it ensured that the windows would open only after LPFM applicants had the opportunity to secure spectrum for their proposed facilities.

In the *AMR First R&O*, the Commission ordered, first, two filing windows for AM licensees wishing to purchase and modify existing FM translators to use as cross-service translators, followed by two auction windows for new cross-service FM translators, which have since been designated Auctions 99 and 100.¹⁷ The Commission limited participation in the Auction 99 and 100 windows to those AM station licensees that had not already participated in a modification window.¹⁸ This restriction reduced the number of new translator applications that could be filed, as many AM broadcasters opted to modify and relocate an existing FM translator rather than apply for a new one. Although some commenters expressed concern about the effect of the new cross-service FM translator auction windows on licensing opportunities for other secondary services,¹⁹ none sought reconsideration of the tailored window-specific eligibility requirements and adopted filing procedures.²⁰

¹⁴ *Id.* at 15222, para. 3.

¹⁵ *Id.* at 15228, para. 17.

¹⁶ *Id.* at 15229, para. 18.

¹⁷ *AMR First R&O*, 30 FCC Rcd at 12152-54, paras. 15-17.

¹⁸ *Id.* at 12153, para. 17.

¹⁹ *Id.* at 12150 n.28; CFI Comments.

²⁰ Petitioner did seek reconsideration of the Second Report and Order in the *AM Revitalization* proceeding, *Revitalization of the AM Radio Service*, Second Report and Order, 32 FCC Rcd 1724 (2017) (*AMR Second R&O*), in which the “fill-in” area for cross-service FM translators was expanded from the lesser of the AM primary station’s daytime 2 mV/m contour or a 25-mile radius centered at the AM transmitter, to the greater of those areas. Petitioner argued that the Commission’s failure to adopt a set distance limit from an AM transmitter for siting cross-service

In short, the procedures adopted for the AMR filing windows, like those adopted following the Auction 83 filing window, were designed, first, to prioritize the LPFM filing window before opening translator opportunities to AM licensees, and second, to strike a balance between the stated goals of the *AM Revitalization* proceeding and the need to preserve spectrum for future applicants. First, the Commission limited participation to AM station licensees and permittees on a one-per-AM station basis, thus effectively capping the potential number of applications at 4,684 (the total number of AM stations at the time).²¹ Second, translators were required to operate on a fill-in basis only, thus markedly restricting the area in which such a translator could be located.²² Third, the introduction of a modification window, allowing AM broadcasters to move an existing FM translator up to 250 miles rather than add a new FM translator, further limited the number of potential new FM translator grants, as modification window participants were precluded from participating in Auction 99 or 100. Finally, new translators awarded through the Auction 99 and 100 filing windows may not be assigned or transferred except in conjunction with the AM primary station by which it is owned, and may not rebroadcast any other station, thus limiting the extent to which it can be moved and precluding potential interference with other secondary station licensing opportunities.

The end result of these restrictions is that no more than 1,770 new cross-service FM translators have been or can be granted as a result of the Auction 99 and 100 filing windows, out of a theoretical maximum of 4,684. This is comparable to the percentage of new translator grants from the Auction 83 window, *vis-à-vis* the original number of applications, suggesting that the restrictions placed on Auction 99 and 100 applicants were equally efficacious in terms of overall spectrum preservation.

To the extent that Petitioner argues that Section 5 requires a market-by-market evaluation of secondary spectrum availability, or prohibits further award of FM translator construction permits in markets where translators outnumber LPFM stations, we reiterate that nothing in the language of Section 5 mandates such specific measures. It requires only that the Commission ensure that licensing opportunities are available for all secondary services, that its licensing decisions are made based on the needs of the local community, and that all secondary services remain equal in status (not number) and secondary to full-service FM stations. The Auction 99 and 100 procedures are in full compliance with Section 5's dictates.²³ The Commission determined that AM radio stations provide important community-

FM translators would negatively impact LPFM stations and their ability to relocate. That petition was denied by the Commission. *Revitalization of the AM Radio Service*, Order on Reconsideration, 33 FCC Rcd 5082 (2018).

²¹ The current total of AM stations, as of September 30, 2019, is 4,601.

²² When the *AMR First R&O* was adopted this area was further restricted to the lesser of the AM primary's daytime 2 mV/m contour or a 25-mile radius. It was later expanded in the *AMR Second R&O*.

²³ We reject Petitioner's contention that Auction 83 procedures have been utilized outside the Auction 83 context, specifically in the licensing of FM translator modifications using the so-called "Mattoon Waiver," first established in *John F. Garziglia, Esq.*, Letter Decision, 26 FCC Rcd 12685 (2011) (*Garziglia*). Petition at 7, 9-10. First, nothing in *Garziglia* or any subsequent Commission decision requires a preclusion study, and currently the staff does not require them. Second, in *Garziglia* it was noted that "certain temporary restrictions on the modification of translator stations were necessary to preserve LPFM licensing opportunities in identified spectrum-limited markets." 26 FCC Rcd at 12688 (emphasis added). That decision clearly did not contemplate that such restrictions would be permanent. Finally, while Petitioner emphasizes the staff's finding that the translator modification in *Garziglia* would not foreclose future LPFM licensing opportunities, it neglects to mention another finding, that of the public interest in revitalizing the AM broadcast band: the staff found that the proposed waiver was "consistent with our continued efforts to revitalize the AM service and to make the most efficient use of limited spectrum." *Id.* at 12688-89. As stated in the text, the purpose of the Auction 99 and 100 windows was to assist the primary AM broadcast service through use of FM translators, and that purpose informs our determination much as it did in *Garziglia*.

based programming, and that measures needed to be taken to preserve that service. Thus, the needs of local communities were taken into account, and those communities will benefit by having AM service that is expanded into areas and dayparts that local AM stations cannot currently provide, with better signal quality. Moreover, to the extent that the Commission chose to augment existing AM service with FM service, FM translators represented the only viable option.²⁴ LPFM stations are not authorized to re-broadcast the signals of other services, and are by definition noncommercial educational stations that could not re-broadcast commercial AM programming in any event. While Section 5 mandates that secondary services be equal in status, FM translators and LPFM stations are not equal in their ability to address the articulated public interest need of preserving AM service to communities.

Given the unique suitability of FM translators to the *AM Revitalization* effort, the Commission implemented measures designed to minimize the number of new translator grants and thus preserve spectrum for other secondary services. Applications were capped at one per AM station (as opposed to allowing multiple translator grants) and further capped by forcing applicants to choose between modifying an existing translator or applying for a new one. Finally, nothing in the Auction 99 or 100 procedures elevates new cross-service FM translators to higher status than LPFM stations, and in fact the siting and alienability restrictions on these new translators in many cases give them less flexibility than previously authorized FM translators and LPFM stations.

Section 5 does not, by its terms, mandate that the same drastic spectrum-preservation measures adopted in Auction 83 be used in Auctions 99 and 100, just as it does not require that the same measures adopted in Auctions 99 and 100 be used in subsequent FM translator or LPFM windows.²⁵ The Commission must make public interest decisions for all aural services, and these decisions always involve a balancing of interests. The prevailing interest in Auction 83 was to prevent an extraordinary number of FM translator applications from depleting all available secondary service spectrum. In Auctions 99 and 100, the prevailing interest was to enable AM stations to expand and improve the service they provide to their communities. Were we to impose the extreme market-by-market limits used in Auction 83 that Petitioner demands, we could severely dilute—if not undercut completely—the public interest benefits to local markets served by AM stations that the Commission sought to implement in the *AMR First R&O*.²⁶

We therefore reject Petitioner’s contention that the procedures set up for Auction 83 must be utilized in all subsequent secondary service filing windows. We find that the Commission’s procedures

²⁴ We disagree with Petitioner’s suggestion that, under Section 5, LPFM stations rather than FM translators are universally preferred for service to urban areas, while translators should be reserved for service to rural areas (Petition at 7-8). Petitioner bases this argument on language in the *LPFM Fourth R&O*, 27 FCC Rcd at 3372, para. 18, 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 we noted in *Mr. Justin Howze and Marissa C. Repp, Esq.*, Letter Decision, DA 19-1229 at 2 n.7 (MB Dec. 4, 2019) (*Howze*), 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 and in rural areas, and likewise FM translators have proved effective in more densely populated urbanized areas. Indeed, and as we observed in *Howze*, to accept such a 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.

²⁵ We also note, as we did in the *Letter Decision*, 33 FCC Rcd at 5398, that Section 5 by its terms gives to the Commission, not the applicant, the responsibility of ensuring availability of licenses for secondary services.

²⁶ Cf. *Nat'l Ass'n of Broadcasters v. FCC*, 569 F.3d 416, 425 (D.C. Cir. 2009) (noting that while Commission’s engineering judgment regarding interference from LPFM stations to full-service FM stations did not change, it reevaluated the competing priorities of interference protection and preserving existing service in the face of changed circumstances).

for Auctions 99 and 100, adopted after notice and comment, comport with Section 5 while serving the stated public interest rationale for the auction filing windows. Accordingly, we deny the Petition.

Conclusion. For the foregoing reasons, the Petition for Reconsideration IS DISMISSED as to Center for International Media Action and Common Frequency, Inc., and IS DENIED as to Petitioner Prometheus Radio Project.

Sincerely,

Albert Shuldiner
Chief, Audio Division
Media Bureau

EXHIBIT E



Federal Communications Commission

Washington, D.C. 20554

December 4, 2019

DA 19-1229

Released: December 4, 2019

In Reply Refer To:
1800B3-TSN

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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.

CERTIFICATE OF SERVICE

It is hereby certified that true copies of the foregoing "Opposition to Petition for Reconsideration" have been served by first-class United States mail, postage prepaid, on this 13th day of February 13, 2020 upon the following:

Charles Gwyn
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Dennis J. Kelly