Before the
Federal Communications Commission
Washington, DC 20554

In re: Application of	)	
Park Public Radio, Inc.	)	
	)	FCC File No. 0000142335
For Construction Permit for a Minor Modification of License for Low Power FM Station KPPS-LP	)	Facility ID No. 196131
In re: Application of	)	
Central Baptist Theological Seminary of Minneapolis	)	FCC File No. 0000142489
	)	Facility ID No. 202408
For Minor Change to FM Translator Station K250BY, Plymouth, MN	)	

To: Office of the Secretary

OPPOSITION TO PARK PUBLIC RADIO, INC.'S APPLICATION FOR REVIEW

Respectfully submitted,

CENTRAL BAPTIST THEOLOGICAL SEMINARY OF MINNEAPOLIS

By: Gregg P. Skall
Ashley Brydone-Jack
Telecommunications Law Professionals PLLC
1025 Connecticut Ave, NW
Suite 1011
Washington, DC 20036
Tel: (202) 789-3121

March 17, 2023

TABLE OF CONTENTS

SUMMARY

Central Baptist Theological Seminary ("Central Baptist") respectfully requests that Park Public Radio's ("PPR") Application for Review be denied and/or dismissed. As explained more fully herein, PPR's Application for Review fails to set forth a violation of statute, regulation, law, or precedent, does not involve a question of unsettled law or policy, does not request the precedent or policy be overturned or revised, does not allege erroneous findings as to important or material questions of fact, and does not involve a prejudicial procedural error. The Application for Review largely sets forth unsupported and previously raised arguments that have been fully considered and correctly rejected by the Media Bureau. The Bureau's decision should be affirmed on all counts, which properly concluded that: (1) PPR failed to timely raise a 312(g) challenge to KQEP-LP's license; (2) the Bureau amply justified its decision; (3) the evidence presented by PPR was insufficient to justify its claims; (4) the Bureau was not required to rely on unpublished precedent to grant PPR's decision; (5) denying PPR the right to amend its dismissed application nearly one year after it was filed was not reversible error; (6) a compromise is not possible and is irrelevant to the issues of this case. The handful of new arguments made by PPR were never raised at the Bureau and should be dismissed as they were not timely raised before the Bureau. The arguments presented in the Application for Review do not warrant Commission consideration and it should be dismissed and/or denied.

Before the
Federal Communications Commission
Washington, DC 20554

In re: Application of	)	
Park Public Radio, Inc.	)	
	)	FCC File No. 0000142335
For Construction Permit for a Minor Modification of License for Low Power FM Station KPPS-LP	)	Facility ID No. 196131
In re: Application of	)	
Central Baptist Theological Seminary of Minneapolis	)	FCC File No. 0000142489
	)	Facility ID No. 202408
For Minor Change to FM Translator Station K250BY, Plymouth, MN	)	

To: Office of the Secretary

OPPOSITION TO PARK PUBLIC RADIO, INC.'S APPLICATION FOR REVIEW

Central Baptist Theological Seminary of Minneapolis ("Central Baptist"), by its attorneys, and pursuant to Section 1.115 of the Federal Communications Commission's ("FCC" or "Commission") Rules, hereby files this Opposition to the Application for Review filed by Park Public Radio ("PPR") in the above captioned files.[1] As described below, the Application for Review fails to demonstrate the Media Bureau made a material error of law or fact, fails to raise new questions of law or fact, does not involve precedent or policy that should be overturned or revised and must be denied as a matter of law.

[1] 47 C.F.R. § 1.115.

I. BACKGROUND

Central Baptist is the licensee of FM Translator Station K250BY in Plymouth, Minnesota. On April 1, 2021, Central Baptist filed an application for minor modification, requesting that it be permitted to relocate K250BY to a location in downtown Minneapolis after the license of a mutually-exclusive low power FM station (KQEP-LP) had expired. Prior to the date of expiration of KQEP-LP's license, PPR, licensee of KPPS-LP, filed an application for minor modification, mutually-exclusive with KQEP-LP, on March 31, 2021, seeking to relocate its transmitter and change frequency. On July 5, 2022, after full consideration of the numerous pleadings in this case, the Media Bureau ("Bureau") issued a letter decision ("Letter Decision") granting Central Baptist's application and denying PPR's application, finding PPR's application was both procedurally deficient, as it was filed prior to the expiration of KQEP-LP's license, and violated the Commission's minimum spacing requirements.

On August 4, 2022, PPR filed a Petition for Reconsideration with the Bureau, which largely reiterated arguments that the Bureau had fully considered and rejected in its Letter Decision and raised a handful of new, untimely, and insufficiently supported arguments. Specifically, PPR alleged the decision violated the Administrative Procedures Act, failed to comply with *Melody Music*, failed to give an unpublished decision precedential effect, and failed to determine when KQEP-LP's license actually expired pursuant to section 312(g) of the Communications Act. On February 6, 2023, the Bureau issued a second letter decision ("Reconsideration Decision") denying PPR's Petition for Reconsideration. The Bureau found that the Petition for Reconsideration had largely reiterated previously rejected arguments, warranting dismissal of the Petition and that the

new arguments and evidence PPR presented were untimely and insufficient to warrant reconsideration.

The Application for Review seeks Commission review of the Reconsideration Decision.

II. DISCUSSION

PPR's Application for Review should be denied. Pursuant to 47 C.F.R. § 1.115, the Commission will only consider an application for review when "the petitioner can show that the action taken pursuant to delegated authority: (1) is in conflict with statute, regulation, case precedent, or established Commission policy; (2) involves a question of law or policy that has not previously been resolved by the Commission; (3) involves application of a precedent or policy that should be overturned or revised; (4) involves an erroneous finding as to an important or material question of fact; or (5) involves a prejudicial procedural error."[2] As described in greater detail below, PPR's Application for Review fails to set forth a violation of statute, regulation, law, or precedent, does not involve a question of unsettled law or policy, does not request the precedent or policy be overturned or revised, does not allege erroneous findings as to important or material questions of fact, and does not involve a prejudicial procedural error. Accordingly, PPR's Application for Review should be denied, and the Bureau's decision affirmed.

A. The Bureau Properly Rejected PPR's new Section 312(g) Arguments with Regard to KQEP-LP in the Reconsideration Decision

First, PPR alleges that the Bureau materially erred when the Bureau rejected PPR's arguments regarding the expiration of KQEP-LP's license. Specifically, PPR argues that it had timely argued KQEP-LP's license had expired as a matter of law in its application and that Bureau

[2] *DIRECTV, LLC, et al. v. Deerfield Media, et al.*, Memorandum Opinion and Order and Notice of Apparent Liability for Forfeiture, 35 FCC Rcd 10695, 10704, para. 21 (2021); 47 C.F.R. § 1.115(b).

was required to consider its additional evidence on reconsideration. The Bureau correctly concluded, however, that the issue was not raised prior to reconsideration and that PPR's evidence was unpersuasive and untimely.

First, PPR did not timely raise an argument that KQEP-LP's license had expired as a matter of law. In its application, PPR stated that "The license for KQEP-LP expires as of 3:00 am April 1, 2021.[3] No license renewal has been filed. No signal from KQEP-LP has been heard in well over a year, and no transmitting antenna could be found at or near the coordinates specified in its license." PPR further stated in a footnote that its claim regarding the signal was based on observations by PPR's principal in an area where he believed he should have received KQEP-LP's signal and an inability to find public information regarding the continued existence of the station. The record below contains no evidence to this effect other than the PPR's unsupported statement. This is insufficient to raise an argument that KQEP-LP's license had expired.

It is not clear from this series of statements that PPR was attempting to allege that KQEP-LP's license had expired as a matter of law. The plain language in PPR's application states that the license did not expire until April 1, 2021. If PPR was actually alleging the license had expired prior to April 1, 2021 as a matter of law (i.e., as of the filing of PPR's application), then it would not have stated the license expired the following day. By attempting to claim it both ways, PPR simply confuses the issue and the nature of its argument. Thus, the Bureau correctly concluded this did not constitute a clear allegation that KQEP-LP's license had expired.

Even assuming, for the sake of argument, however, that it was clear PPR was attempting to make a 312(g) argument, PPR provided nothing other than bald statements vaguely suggesting KQEP-LP's license could have possibly expired to support its claim. In order for a station to

[3] Application File No. 0000142335, Engineering Statement, at 1 (filed Mar. 31, 2021).

expire pursuant to section 312(g), the station must have been silent for twelve consecutive months.[4] PPR's allegation that its principal occasionally listened for the station is insufficient to demonstrate that the station was never on air at any time during the preceding year. Further, as PPR notes, KQEP-LP was a time-share station. PPR's allegations do not provide any information regarding when PPR's principal was attempting to listen to the station, which could have easily occurred outside of KQEP-LP's broadcasting window. Without additional information and reliable evidence to support the claim that KQEP-LP's license had expired as a matter of law, there was no reason for the Bureau to give credence to these allegations.

Second, in its subsequent arguments, PPR did not rely on section 312(g) to allege that KQEP-LP's license had expired and PPR's application was timely filed. Despite numerous filings in the record, PPR continued to insist that KQEP-LP's license did not expire until April 1, 2021.[5] Indeed, PPR at one point went so far as to allege that both PPR and Central Baptist's applications were untimely as they were filed prior to deletion of the license on April 2, 2021.[6] Despite presenting a variety of unpersuasive arguments regarding the expiration of KQEP-LP's license, PPR did not argue that the license had expired pursuant to section 312(g) in its subsequent filings, and the Bureau reasonably concluded that PPR was not relying on that provision to sustain its claims.

Third, the evidence PPR eventually presented was untimely and insufficient. In its Petition for Reconsideration, PPR provided four items to support its allegation that KQEP-LP had not been

[4] 47 U.S.C. § 312(g).

[5] Opposition of PPR to Petition to Deny, Pleading File No. 0000144466, at 3 (filed May 3, 2021); Reply of PPR to Opposition to Informal Objection, Pleading File No. 0000150529, at 4 (filed June 20, 2021).

[6] Opposition of PPR to Petition to Deny, Pleading File No. 0000144466, at 3 (filed May 3, 2021).

broadcasting for over a year. There was no explanation provided for why these items were not provided sooner. As noted previously, there were a number of filings during this proceeding, and at any time, PPR could have provided evidence to support its claim that KQEP-LP's license had expired. It did not do so and did not provide any explanation for its failure in the Petition for Reconsideration.

Even if PPR had attempted to explain away its late offer of evidence, the Bureau correctly concluded the evidence was unpersuasive. The evidence constituted: (1) a declaration from PPR's principal, Jeffrey Sibert, which merely states the principal occasionally attempted to listen to the station and was unable to locate it, had been unable to reach the licensee, and had emailed a building manager to determine if the building ("Court West") had housed a radio station; (2) the email from the Court West building manager; (3) minutes from the Board of Regents of the University of Minnesota who operated another building ("University Building") that he thinks KQEP-LP may have operated from; and (4) Google images of the alleged buildings. First, the declaration is insufficient for the same reason as the allegations in the application. Occasionally attempting to listen to the station does not support a claim that the station was consecutively off air for twelve months, and the Bureau properly declined to rely on this evidence. Second, the Bureau properly rejected the email from the Court West manager because it was unsworn and unverified. Third, the Bureau also properly rejected the Board of Regent minutes for the same reason. Though PPR has now provided a signed copy of the minutes, they do not support PPR's claim that there was no radio station on the building and are not probative, as the Bureau concluded. Finally, the Bureau also properly concluded the photos were not sufficient to demonstrate KQEP-LP was off air for twelve consecutive months. The photo of the rooftops is undated. It is unclear exactly when this photo was taken by Google, and PPR appears to concede

that point as it only references one photo in its Application for Review. The one photo from 2019 is from one side of the building, not the roofs, and does not unequivocally demonstrate that there was no antenna on the roof or anywhere on the building. Even if the photo of the roofs is from 2019, it is low quality, and it is difficult to determine what some of the equipment is. Further, even if there is no antenna in the pictures, the photos only show one date and cannot demonstrate the station was off air for a consecutive twelve-month period. The antenna may have been removed for a period of time, and that would not have resulted in a cancellation of KEQP-LP's license. None of this is sufficient to demonstrate that KEQP-LP was off air for a consecutive twelve-month period and the Bureau correctly rejected PPR's claim.[7]

PPR attempts to present two other arguments regarding the expiration of KQEP-LP's license, both of which are unavailing. First, for the first time in the Application for Review, PPR appears to allege that KQEP-LP's license actually expired as of 3 PM on March 31, 2021 because it was a time-share station and could not operate between 3 PM and 3 AM. As PPR did not raise this issue before the Bureau, the Commission should dismiss it. Further, PPR has provided no legal basis or precedent to support its claim that a time-shared station's license expires at the last possible moment it could broadcast, and the Commission should not adopt such a policy now. This would run contrary to the clear public interest of ensuring the public has notice of when licenses expire and also undermines the ability of such stations to freely contract and adjust their operations as is appropriate to serve their communities.[8]

[7] PPR claims it was the Commission's responsibility to determine sufficient facts to determine whether KQEP had not operated for a consecutive twelve months in an obvious and inappropriate attempt to shift the burden of proof to the Commission since it had not adequately made its own case.

[8] 47 CFR 73.1715

Second, PPR again alleges that Central Baptist's application was premature because Central Baptist filed on April 1, 2021 and KQEP-LP could have filed a license renewal on that date and a petition for reconsideration for 30 days thereafter. PPR cites no law or precedent to support this claim. Further, it continues to ignore the fact that Central Baptist filed its application after the expiration of the license, while PPR did not. Though PPR appears to believe otherwise, the expiration date on a license is clear and not arbitrary, and filing after the license has expired is compliant with Commission policy.

Accordingly, the Bureau correctly determined that PPR had not timely alleged KQEP-LP's license had expired prior to April 1, 2021 and rejected the late provided evidence as untimely and not probative. The Commission should dismiss PPR's allegations on this point and affirm the Bureau's decision.

B. The Bureau Has Amply Justified its Denial of PPR's Prematurely Filed Application

Second, PPR alleges that the Bureau was required to cite to a rule or order to justify the Bureau's dismissal of PPR's application. With regard to the rule, PPR did not raise this issue before the Bureau, and the Commission should dismiss it as untimely. Even assuming it was timely, PPR has relied on no law to demonstrate that the Bureau is required to rely on a rule codified in the Federal Regulations to justify its decisions. The Bureau is allowed to rely on precedent and longstanding policy,[9] and this argument should be dismissed.[10]

PPR argues that the Bureau was required to reference an Order that provides notice of the policy, and indeed, the Bureau did so. The Bureau relied on *Board of Trustees of Eastern Mennonite University*, Letter, 29 FCC Rcd 5925, 5928 (MB June 4, 2014), which was published

[9] *Asbacker Radio Corp. v. FCC*, 326 U.S. 327, 333 n.9 (1945).

[10] 47 CFR § 73.807; 47 CFR 73.870(c)

in the FCC Rcd and thus provides notice to later licensees of the policies and requirements for filing applications. This is in opposition to *Wimberly*, which was merely granted via a Public Notice, and the decision was not published for all to view. While PPR tries to allege the Bureau was contradictory in its decision by saying it had to rely on published precedent in one area (its discussion on *Wimberly*) and failing to do so in another area (its discussion on premature filing), the fact that *Mennonite University* was a published decision eviscerates PPR's argument.

PPR attempts to allege for the first time in the Application for Review that the Bureau cannot rely on *Mennonite University* because it deals with the expiration of a construction permit, not a license. However, the procedures for mutual exclusivity are the same regardless of whether it is a license or a construction permit, and reliance on this case is entirely appropriate.

Finally, PPR also claims for the first time that "minor change applications may be filed at any time unless restricted by staff…" overlooking the restriction imposed by the Commission's rules that require that any such application cannot be mutually exclusive with an existing licensee and must comply with the minimum spacing requirements; PPR's application complied with neither requirement.[11]

Accordingly, this argument should be dismissed, and the Bureau's decision affirmed.

C. The Bureau Fully Considered the Evidence Presented and Rejected It

Third, PPR alleges that the Bureau stated several factual inaccuracies with regard to the evidence PPR presented. As noted above, the Bureau fully considered and appropriately rejected the evidence.

[11] 47 CFR § 73.807; 47 CFR § 73.870.

D. The Bureau Fully Considered and Correctly Rejected PPR's Argument That *Wimberly* Should Control Here

Fourth, PPR alleges that the Bureau rejected PPR's citation to *Wimberly* and concluded that PPR's application violated the Commission's short spacing rules. Specifically, PPR argues the Bureau was required to rely on *Wimberly*, did not appropriately consider PPR's arguments, and has introduced new concepts via the Reconsideration Decision with regard to this point. PPR's arguments fail for a number of reasons.

First, contrary to PPR's arguments, the Bureau was not permitted to rely on the decision in this case. Using *Wimberly* to grant PPR's application would necessarily mean using an unpublished case to reject Central Baptist's application. Using an unpublished case against Central Baptist would have been a violation of the Commission's rules, as it did not have actual notice of the case.[12]

Second, PPR again ignores the fact that, though the Bureau primarily concluded that *Wimberly* could not be relied upon in this case, the Bureau did actually consider and address PPR's arguments regarding *Wimberly*. The Bureau expressly considered the factual circumstances in *Wimberly*, compared them to PPR's application, and concluded that even if *Wimberly* could control, it was factually inapplicable here. The Bureau found that "unlike the scenario in Wimberly where the LPFM station was moving from a co-channel short-spacing to a first-adjacent short-spacing, which improved matters, PPR proposes to move from a second-adjacent channel short-spacing to a first-adjacent channel short-spacing, which is problematic."[13] Thus, though it was not required to do so, the Bureau fully considered *Wimberly*, and Commission review is not justified simply because PPR disagrees with the Bureau's conclusion.

[12] 47 C.F.R. § 0.445(f).

[13] Bureau Letter Decision at 10.

Finally, contrary to PPR's claim, the Reconsideration Decision did not introduce new concepts with regard to stations moving channel relationships. Rather, it relied on a comparison of PPR's proposal with that proposed in *Wimberly* to distinguish the two relationships. The Bureau's decision clearly relied on an analysis of harmful interference, as it has always done, finding that in *Wimberly*, the changed channel resulted in less potential for harmful interference (i.e., a "better channel relationship, in terms of interference") while the proposal in PPR's application would not have the same result. The Bureau was simply and clearly explaining its analysis, not introducing new concepts as proposed by PPR. Rather, it is PPR that is attempting to introduce a new concept into the Commission's rules by arguing that any demonstration of a reduction of interference, regardless of channel adjacency, should be allowed. But to allow this to occur would require a notice and comment rule-making proceeding since it is contrary to existing rules and would require a thorough examination of the implications and consequences of such a rule change, not an ad hoc, one-off, seat of the pants decision. For the same reason, its unsupported request for waiver of the rules must be rejected.

E. Denying PPR the Right to Amend a Dismissed Application is Not Reversible Error

Fifth, PPR alleges Media Bureau staff improperly denied it the right to amend its application after it had been dismissed and a separate application granted. PPR has provided no explanation or basis for this claim. Though PPR alleges there "are numerous examples of applications that requested waivers and are allowed to file nunc pro tunc reinstatement," PPR provided no references or citations to such applications.

In this instance, nunc pro tunc amendment would be highly inappropriate. This was not a matter of a small procedural error where there was no competing application. The Bureau fully considered PPR's application and determined it was procedurally improper and technically unable

to proceed. The Bureau then granted Central Baptist's application. Allowing a nunc pro tunc amendment over a year after the application was filed and after a full decision on the merits was released would essentially ensure that no application decisions were ever final, which is not good policy.

F. PPR's Proposed Compromise is Not a Compromise and is Irrelevant

Finally, PPR alleges that there are numerous alternative locations for Central Baptist while PPR has none. As has been demonstrated numerous times in this record, Central Baptist has worked in good faith to reach a compromise solution and has dutifully researched PPR's proposals to determine if they were a useful option to avoid the expense of continuing to litigate this issue. The fact is that the PPR proposed alternatives are unworkable for Central Baptist despite PPR's insistence to the contrary.

Further, whether alternatives exist is irrelevant to the issue at hand. Central Baptist presented a timely and compliant application and was awarded a construction permit. It is not required to consider unworkable proposals simply because another party disagrees with the Commission's decision.

Similarly, PPR's arguments regarding its inability to construct its full power noncommercial stations are irrelevant as well. This proceeding does not impact PPR's ability to begin construction on those stations except to the extent to which PPR continues to make business decisions that cause such delay. PPR is not required to continue to prosecute this issue and is, of course, able to file a different minor change application, as was recommended by FCC staff. PPR's decisions to continue on this path, which may result in a delay in constructing its full power

stations, are not a reason, however, to overturn the Bureau's decision.[14] As the Commission has repeatedly recognized, where a station is forced off air due to its "own actions, finances, and/or business judgments," the Commission is not required to accommodate such decisions or grant such licensees additional leeway to avoid unfortunate circumstances that may result from the licensee's decisions.[15]

G. The Bureau Correctly Decided the Two Applications

Despite PPR's allegations to the contrary, the Bureau fully considered all of PPR's arguments in both its Letter Decision and Reconsideration Decision and correctly concluded that PPR's application must be dismissed. The Bureau fully addressed the procedural differences between PPR and Central Baptist's applications and correctly found that PPR's application was procedurally deficient. The Bureau further addressed the merits of PPR's application, noting that the application failed to comply with the Commission's spacing requirements. Though PPR found one non-precedential instance where an application that reduced short spacing may have been granted, the Bureau correctly distinguished that application from PPR's application, finding that it was not applicable here. The Bureau also appropriately rejected the untimely arguments that KQEP-LP's license had expired prior to PPR's filing of its application. While PPR clearly disagrees with the Bureau's decision, the fact of the matter is the Bureau fully considered and rejected each of the Petition's allegations in its decision, and there is no basis for Commission review in the instant case. None of the above allegations demonstrates that the Bureau's Letter

[14] Notably, PPR's full power noncommercial stations were not submitted as contingent applications subject to its ability to assign KQEP-LP to another entity. Rather, those unconditional applications were granted with the contingency only that PPR could not also be the licensee of any low power FM.

[15] *In re DKCPM(TV), Grand Forks, ND*, MB Letter Order, 35 FCC Rcd 5375, 5378-79 (May 22, 2020).

Decision and Reconsideration Decision failed to comply with the statute, regulations, or precedent, involves a question of law or policy the Commission has not resolved, involves policy or precedent that should be overturned or revised, involves a material question of fact, or involves anything prejudicial to PPR.

III. CONCLUSION

As explained above, the PPR Application for Review fails to demonstrate that the Bureau made a material error of law or fact and merely reiterates arguments that the Bureau fully considered and properly rejected. Accordingly, Central Baptist respectfully requests that PPR's Application for Review be denied.

Respectfully submitted,

CENTRAL BAPTIST THEOLOGICAL SEMINARY
OF MINNEAPOLIS

By: _____

Gregg P. Skall
Ashley Brydone-Jack
Its Attorneys

Telecommunications Law Professionals PLLC
1025 Connecticut Ave, NW
Suite 1011
Washington, DC 20036

Tel: (202) 789-3121
Dated: March 17, 2023

CERTIFICATE OF SERVICE

I, Gregg P. Skall, with the law firm of Telecommunications Law Professionals PLLC, do hereby certify that a true and correct copy of the foregoing "Opposition to Application for Review" was served by U.S. mail, first class, postage-prepaid on the 17th day of March, 2023, on the following individuals:

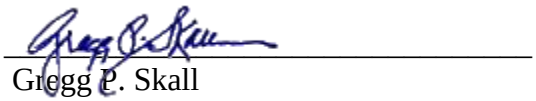
Christopher Clark, Esq.*
Federal Communications Commission
Mass Media Bureau
45 L Street NE,
Washington, DC 20554

Albert Shuldiner, Esq., Division Chief,*
Audio Division, Media Bureau
Federal Communications Commission
45 L Street NE,
Washington, DC 20554

James Bradshaw*
Senior Deputy Division Chief, Audio Division, Media Bureau
Federal Communications Commission
45 L Street NE,
Washington, DC 20554

Jeffrey Sibert**
President
Park Public Radio, Inc.
3340 Utah Ave S.
St. Louis Park, MN 55426
jeff@parkpublicradio.org

* Indicates E-Mail Delivery
** Indicates E-Mail Delivery and U.S. Mail delivery



Gregg P. Skall