

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC

18 August 2023

In re Application of)	
)	
FORT MYERS BROADCASTING COMPANY)	
For FM Translator License)	FCC File No. 0000120834
Call Sign W239CL, Golden Gate, FL)	Facility ID 139116
To: Marlene H. Dortch, Secretary		
Federal Communications Commission		
Attn: The Commission		

REPLY TO OPPOSITION TO APPLICATION FOR REVIEW

Sumarrase, Inc. (“Sumarrase”) files this Reply To Opposition (“Reply”) in response to the Opposition to Application for Review (“Opposition”) submitted August 8, 2023, by Fort Myers Broadcasting Company (“FMBC”).¹ Sumarrase has sought review of the dismissal of its Petition for Reconsideration (the “Petition”) in the above-captioned matter.² This Reply is timely filed pursuant to 47 C.F.R. Section 1.115(d).

¹ The Opposition is Pleading File No. 0000219065, filed in response to Sumarrase's Application for Review, Pleading File No. 0000218417.

² Letter from Albert Shuldiner, Chief, Audio Division, Media Bureau, FCC, to Jennifer A. Johnson, Esq., and Dwayne Williams, W239CL, Golden Gate, FL, Fort Myers Broadcasting Company, Application for License, Petition for Reconsideration/Interference Complaint, DA 23-542 (June 23, 2023) (“Decision”).

In rebuttal, FMBC argues that the Audio Division properly dismissed the Petition on procedural grounds, that Sumarrasee's claims of interference being caused by W239CL would not have been actionable anyway, and that Sumarrase was not treated differently than FMBC. FMBC does not address the merits of arguments that have been raised in the Application for Review. Instead, FMBC makes circular arguments relying on the Decision itself that Sumarrase requesting to be reviewed.

FMBC first argues that the Audio Division properly dismissed the Petition on procedural grounds. FMBC states that “Sumarrase was not a party to the proceeding because, despite having six months to do so, it did not file an objection to the W239CL modification application”³ It goes on to suggest that “Sumarrase was required to provide ‘good reason’ as to why it did not participate during that period.”⁴ Sumarrase explained that it was receiving interference from W239CL and that the initial listener complaints which Sumarrase believed to be valid were not received until September 11, 2020, that this date falls after August 27, 2020, and it was thus unreasonable that its arguments of actual interference could have been raised during the six months that the modification application was pending.⁵ A reason of “actual interference” on its face shows good cause to not interject during a permitting phase since actual interference plainly cannot occur before construction.⁶

3 Opposition at 2.

4 *Id.*

5 Petition, at 1, and Reply To Opposition, Sumarrase, Inc., *Application of Fort Myers Broadcasting Company for FM Translator License, Call Sign W239CL, Golden Gate, FL*, FCC File No. 0000120834, Pleading File No. 0000125099 (filed October 27, 2020) (“Petition-Reply”) at 2.

6 *Id.* See also 47 CFR Section 74.1203 (“Section 74.1203”).

The real issue is that Sumarrase's Petition made a complaint of actual interference under Section 74.1203 before a grant of the license was final while the Petition was instead dismissed because a Section 74.1204 objection was not made while the underlying construction permit was under consideration.⁷ Regardless of the merits of the interference complaint, the fact that an authorized FM translator will not be permitted to operate if it causes actual interference considered with the absurdity of licensing a station that cannot be operated, a threshold was reached to entertain the Petition.⁸ The Bureau should overrule the Bureau's determination that a translator causing prohibited interference when it comes on the air would not rise to the level that would make the operation of the translator against the public interest.⁹

Where the Bureau focused on Section 74.1204 procedures, FMBC does not rebut Sumarrase's claim that identifying anonymous listeners and performing engineering analyses on those listeners falls outside the realm of ordinary diligence and that a standard of “ordinary diligence” applies.¹⁰ Implicit in the Bureau's finding that Sumarrase must have presented interference claims while the permit application was pending is that ordinary diligence always makes interference complaints possible at such a stage.¹¹ This is a strained finding in the face of the Commission's previous statements. In the proceeding that updated interference complaint procedures, the Commission recognized that “[a]nalyzing the validity of listener complaints can be time-consuming and expensive for all parties involved.”¹² That conclusion only addressed

7 See 47 CFR Section 74.1204 (“Section 74.1204”).

8 Section 74.1203(a). See also 47 CFR Section 1.106(b)(1) (“Section 1.106”).

9 Decision at 4.

10 *Id.*, using the “predicted” language found in Section 74.1204(a),(j).

11 See Section 1.106(b)(2)(ii).

12 *Amendment of Part 74 of the Commission's Rules Regarding FM Translator Interference*, Report and Order, 34 FCC Rcd 3457, 3458-3459 at para 3 (“Interference Resolution Order”).

analysis of received complaints, not even including the time and financial expense of identifying who would complain from among listeners that have yet to both receive and report receiving interference.¹³ The record shows that Sumarrase did not sit on its hands when it received interference complaints related to the modified W239CL.

The Commission also stated that a “proposed translator may ‘pass the test’ provided by section 74.1204(f) but still cause actual interference after operation commences.”¹⁴ A goal of the new rules, to “encourage translator applicants and their engineers to propose facilities that are more viable in the long term,” (emphasis added) places a burden on FM translator applicants to propose facilities that are viable in the long term, and we see here that using contour protection to its limits to abut a smaller station may not always be viable.¹⁵ An applicant acquires the risk of non-viability due to interference.

Finally, in addressing FMBC's argument that Sumarrase did not participate earlier in the proceeding, FMBC failed to account for the relationship already established between FMBC and Sumarrase. If complaints based on predicted interference must be made to gain standing to seek review of an action that results in actual interference, then any Commission goals the Commission has that parties try to resolve their differences without involving the Commission's resources are thwarted. The record includes an admission that W239CL has interfered with WSGD-LP.¹⁶ Thus, it is the reasonable conclusion that Sumarrase is also a party to proceedings

13 47 CFR Section 74.1204(f)(1). While areas susceptible interference can be developed, valid complaints from actual listeners must still be received and analyzed in order to participate. This is an insurmountable burden for LPFM stations like WSGD-LP. Stations cannot object only on grounds that undesired to desired signal strength ratios exceed established thresholds within their 45 dBu contour.

14 Interference Resolution Order at 3481-3482, para 48.

15 *Id.*

that attempt to eliminate that interference. FMBC has not rebutted that the Commission should review that an error was made with respect to this claim.

FMBC's second opposing argument is that Sumarrase is not entitled to interference protection because it operated with a 2-bay antenna instead of the 1-bay antenna it documented on its license application, it.¹⁷ This argument, copied from the Decision, is a topic presented for review. The constructed station with the 2-bay antenna, authorized by a construction permit, and the parameters on the license are materially the same being 22 W ERP at 60 meters AGL.¹⁸ The substitution of a different model or bay configuration of a non-directional antenna does not figure into contour prediction when the proper antenna gain factor is used to calculate ERP as was done.¹⁹ Sumarrase still questions that the antenna difference provides a material basis for the Bureau to reject a claim of interference.

FMBC continues to suggest that Sumarrase has operated WSGD-LP with excessive transmitter power.²⁰ The Bureau rightfully did not bite on FMBC's bait in reaching its decision. FMBC submitted information in the form of a complaint to the Media Bureau on May 10, 2019, that documented that its employees gained unauthorized access to Sumarrase's locked transmitter facility.²¹ FMBC even included pictures of a lighted transmitter screen which indicates that the

16 See Application File No. 0000092800 submitted December 6, 2019 at attachment "TECHNICAL SUMMARY" para. 1.

17 Opposition at 2-3.

18 See File No. BMPL-20171109ACU, Authorization.

19 See 47 CFR Section 73.313.

20 Opposition, at n.9.

21 See Pleading File No. 0000105766 submitted by FMBC on February 11, 2020, at the attached May 10, 2019 Complaint, Exhibit 1.

front panel had been recently accessed, and thus tampered with.²² FMBC apparently intended to say that FMBC has operated WSGD-LP at several different levels of transmitter output.

Nonetheless, the argument is stale when considered against complaints made in September, 2020. There has been no evidence of recent overpower operation that would affect complaints that must be dated within a year of submitting an interference complaint.²³

Finally, FMBC states that Sumarrase did not receive unequal treatment.²⁴ Yet, FMBC included no information to dispel that the existing W239CL FM translator operates with an antenna pattern that is inaccurately represented in its applications seeking authorizations. Sumarrase has been strictly held to the accuracy of the information it provided about its antenna on its license application while FMBC is not held to any standard of accuracy.²⁵ FMBC has admitted the significant discrepancy.²⁶ FMBC's authorization is based on its application, and the construction permit and license therefore each specify a major lobe direction at 170 degrees. Instead, FMBC is operating with a main lobe direction of 240 degrees.²⁷ Station protections and interference analysis are frustrated by this inappropriate construction, and the Bureau erred when it found that Sumarrase did not demonstrate good cause to reverse the public interest determination made during the construction permit proceedings.

22 *Id.* at Attachment 1 to Timothy White Declaration and Attachment 2 to Timothy White Declaration.

23 Interference Resolution Order at 3470-3471, para 26. Sumarrase continues to vehemently deny operating with excessive TPO.

24 Opposition at 3.

25 Decision Letter at 5.

26 See Petition-Reply at 6. See also *Opposition to Petition for Reconsideration*, Fort Myers Broadcasting Company, Pleading File No. 0000124701 submitted October 15, 2020, at Exhibit I.

27 *Id.*

The facts support that W239CL has been interfering with WSGD-LP since April, 2017, and that the FM translator operates with a directional pattern that differs from the tabulated values in its applications. Sumarrase properly objected to the actual interference and to the incorrect pattern. The Commission should grant review.

Respectfully Submitted,

Dwayne Williams

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Certificate of Service

I, Dwayne Williams, certify that a true and correct copy of the foregoing Reply to Opposition was sent, this 18th day of August, 2023, by first-class, postage paid mail to the following:

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By: *Dwayne Williams*

Dwayne Williams