

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

<b>In the Matter of</b>	)	
	)	
<b>NEW RIVER COMMUNITY CHURCH</b>	)	<b>File No. BLL-20170807AAT</b>
<b>Low Power FM Broadcast Station</b>	)	<b>Facility ID Number 193136</b>
<b>WYPH-LP, Manchester, CT</b>	)	

**To:           The Office of the Secretary**  
**Attention:   Chief, Media Bureau**

**PETITION FOR RECONSIDERATION**

Now comes the New River Community Church (the NRC Church), the licensee of Low Power FM Station WYPH-LP, Manchester, Connecticut, by counsel and pursuant to Section 1.106 of the Commission’s rules (47 C.F.R. §1.106), and respectfully requests that the Media Bureau reconsider and reverse the letter decision (Letter Decision) of the Senior Deputy Chief, Audio Division, Media Bureau dated September 28, 2020 (1800B3-KV), in which the Audio Division, under delegated authority, affirmed its own Cease Operation Order (the Order)<sup>1</sup> issued April 23, 2020 relative to WYPH-LP; determined that certain interference complaints filed against WYPH-LP by alleged listeners of WDRC-FM, licensed to Red Wolf Broadcasting Corporation (Red Wolf) were *bona fide*; and declined to even consider the engineering showing made timely by the NRC Church, which demonstrated (as the NRC Church is entitled to do pursuant to Section 73.807(e)(2)(ii) of the Commission’s Rules), that there was *no actual interference*. In this Petition for Reconsideration, the NRC Church will demonstrate that the Letter Decision was arbitrary and capricious; that the Letter Decision deprived the NRC Church of its due

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<sup>1</sup> Letter from James D. Bradshaw, Senior Deputy Chief, Audio Division, Media Bureau, FCC, to New River Community Church dated Apr. 23, 2020 (1800B3-KV) (Cease Operation Order).

process entitlement pursuant to the Local Community Radio Act of 2010, Pub. L. No. 111-371, 124 Stat. 4072 (2011) (“LCRA”) and 47 C.F.R. §73.807 (e)(2); and that the Audio Division materially erred as a matter of fact and as a matter of law in its findings: (1) that the alleged listener complaints submitted by Red Wolf were *bona fide*; (2) that the engineering study provided by a consulting engineering firm independent of the NRC Church (which demonstrated *conclusively* that there was no actual interference from WYPH-LP to the received signals of WDRC-FM), was inherently unreliable and could not even be considered, simply because the independent consulting engineer who investigated the matter and prepared the engineering report had been retained by the NRC Church and thus was not, in the words of the Audio Division, an “independent party;” and (3) that WYPH-LP must remain silent for any further period of time. These findings are patently incorrect; inconsistent with Commission jurisprudence; and have to date deprived the NRC Church of *any* due process in its good-faith attempt to address the interference complaint filed by Red Wolf.

## **I. Introduction.**

1. The NRC Church respectfully requests that the Letter Decision be reversed; that the Cease Operation Order be rescinded; that WYPH-LP be allowed to *immediately*<sup>2</sup>

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<sup>2</sup> WYPH-LP has been off the air for six months now, as of this writing, since receipt of the Audio Division’s Cease Operations Letter dated April 23, 2020. It has not resumed operation since then [though it is entitled to conduct test transmissions pursuant to Section 73.809(d) of the rules]. During virtually the entirety of the COVID-19 pandemic to date, the congregation of the NRC Church has been unable to receive broadcasts of the Church’s services while at home and unable to attend in person. Prior to the Audio Division’s Cease Operation Order, WYPH-LP provided these church services, and other religious programming to the Church’s congregation and the general public in the community of license, Manchester, Connecticut, from early February of 2014 until January 10, 2020, a period of six years, without any interference complaint whatsoever. During that time, and until the April 23, 2020 order of the Audio Division to cease operation, WYPH-LP has been consistently providing Church services and other religious programming and has complied with all Commission rules governing Low Power FM stations. The Church’s programming has become extremely important to its congregation, especially so since the commencement of the COVID-19 pandemic and the stay-at-home obligation of its entire congregation that has been necessitated thereby. Given this, the NRC Church respectfully requests that the Commission

return to the air on its existing channel, thus to resume providing church service broadcasts to the Church's congregation during the continuing COVID-19 pandemic (as well as other programming); and that the interference complaint filed by Red Wolf be denied or dismissed. Alternatively, should the Commission decline to fairly re-evaluate and reverse the Letter Decision quickly, the NRC Church states herein its willingness to conduct on-off testing using an additional consulting engineer unrelated to either party (preferably one retained by both the NRC Church and Red Wolf if Red Wolf agrees<sup>3</sup> to participate in the testing), without delay, and to submit the results of those on-off tests to the Audio Division, thus to determine once and for all whether or not there is interference from WYPH-LP to listeners of WDRC-FM and resolve the issue. If this is deemed by the Audio Division an acceptable method of proceeding, it will be necessary for the Audio Division to agree *in advance* to accept the results of the additional engineering showing from a third party consulting engineer (subject of course to its evaluation of the methodology used), and to ensure that Red Wolf cooperates with the additional engineer in the conducting of on-off tests, regardless of whether or not Red Wolf agrees to participate in the on-off testing. It is also necessary for the Audio Division to agree to allow WYPH-LP to resume operation for the purpose of conducting the tests, and to

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expedite the resolution of this Petition for Reconsideration. Toward that end, the NRC Church includes herein an alternative proposal to address the interference allegations that would obviate any further administrative or judicial appeals relative to this matter, without substantial further delay.

<sup>3</sup> Thus far, Red Wolf has not agreed to participate in a course of further testing proposed hereinbelow. Undersigned counsel for the NRC Church sent an e-mail to counsel for Red Wolf on Tuesday, October 20, 2020 at 10:19 AM asking if Red Wolf would agree to participate in a joint interference investigation using a third party consulting engineer, retained by both parties, the fees of whom would be split evenly. On Wednesday, October 21, 2020, at 7:42 PM counsel for Red Wolf, Scott Woodworth, indicated that he was discussing options with his client. The following day, undersigned counsel noted to Mr. Woodworth the need to resolve the issue in view of the timing of this Petition for Reconsideration. On Friday, October 23, 2020 at 8:25 AM Mr. Woodworth asked who the engineer would be that would do the testing. An hour later, undersigned counsel replied that one had not been identified yet because both parties would have to agree on the engineer, but that the plan would be to identify one in the northeastern part of the country. No further has been heard as of this writing from counsel for Red Wolf.

timely review the findings of the third party engineer and resolve this issue thereafter without further delay. The NRC Church would ask for the Audio Division's approval of the procedure outlined herein, which the Church is willing to pursue immediately, preferably with, but if necessary without, the cooperation of Red Wolf.

2. To be clear, it is not the view of the NRC Church that any further engineering study is necessary at all. It has been demonstrated using valid, accepted engineering methodologies by an independent, competent engineer that there is in fact no interference. The Audio Division was plainly wrong, as is discussed herein, to refuse to consider this study at all, and to affirm its earlier decision to order WYPH-LP to remain off the air. But the NRC Church is willing to engage in these further tests in order to establish again that the interference claims initiated, solicited and prepared by Red Wolf (which has been shown to have a substantial motive to manufacture the interference claim out of whole cloth) are unsubstantiated; that there is *no* such interference and never was; that in fact, Red Wolf's motivation in this initiative has nothing whatsoever to do with interference, but is rather a means to cause the NRC Church's license to be revoked. The NRC Church is willing to participate in this further engineering study so that the operation of WYPH-LP can continue, as it has for the past six years, interference free on its existing FM channel 273; and so that this matter can, as it should, be resolved immediately by restoring WYPH-LP to the air subject to licensed parameters.

## **II. The Audio Division Erred in Finding that the Interference Complaints Submitted by Red Wolf Were *Bona Fide*.**

3. The Letter Decision, at page 6, in the second full paragraph, states the Audio Division's finding that Red Wolf submitted "*bona fide* listener complaints" reporting interference to their WDRC-FM reception. It continued as follows:

A *bona fide* complaint is defined as being “from a disinterested listener and must include the listener’s name and address, and the location at which the interference occurs.” We find meritless New River’s claim that the Listener Complaints are not probative because they were “solicited” by Red Wolf over “a very long period of time.” The Commission places no temporal limitation on interference complaints against LPFM stations operating pursuant to a second-adjacent channel waiver. In addition, New River fails to cite any Rule prohibiting Red Wolf from broadcasting informational announcements on WDRC-FM concerning the interference or from preparing standardized interference complaint forms that are, as is the case here, reviewed and signed by the listener. (citations omitted)

As the Audio Division would have it, it is irrelevant whether the complaints that were filed in this case were initiated by the listeners that filed them on their own initiative, or whether it was Red Wolf, and not those listeners, who suggested that there was actual interference and what the source of that interference is. It is irrelevant to the Division whether it was those listeners or Red Wolf which identified WYPH-LP as the source of the alleged interference. It is irrelevant to the Division whether Red Wolf had a substantial ulterior motive to invent the interference allegation and sell it to some of their listeners as a means of freeing up FM Channel 273 for expanded coverage by Red Wolf’s nascent, co-channel FM translator. And it was assumed by the Division, but not ever investigated or established as a fact, that the alleged listeners who did not write up their own interference complaints but had them prepared by Red Wolf “reviewed” them before signing them. The *only criterion* that the Division used to justify its decision to fully credit the complaints and to find them to be *bona fide* is that they each contained the listener’s name, address and the location at which the interference allegedly occurred: the basic, objective contents of an interference complaint. In doing so, the Division did not distinguish between a complaint from a *bona fide* listener to WDRC-FM and a *bona fide* interference complaint. The NRC Church suggests that the aggregate facts of this case

demonstrated by the NRC Church preclude a finding that the complaints were *bona fide*, whether or not they were submitted by *bona fide* listeners of WDRC-FM, and that a sufficient showing was made that the genesis of, the principal source of information about, and the architect of the interference allegations and the listener complaints was Red Wolf itself.

4. In the LPFM *Sixth Report and Order* in Docket 99-25 and Docket 07-172<sup>4</sup>, The Commission decided at paragraph 84 to adjudicate complaints against LPFM stations operating pursuant to a second-adjacent waiver in the same manner as are interference complaints made by full power stations against FM translators:

We conclude that it is appropriate to handle complaints in a manner similar to that used to handle complaints of interference caused by FM translators. As we noted above, we believe that the LCRA affords the Commission the discretion to rely on our successful FM translator experience in implementing the interference protection regime for second-adjacent LPFM stations. Accordingly, we will adopt the same requirements for complaints that we apply in the FM translator context. As described above, that means that a complaint must come from a disinterested listener and must include the listener's name and address, and the location at which the interference occurs.

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We also note that the scope of the rule prohibiting translator stations from causing "actual interference to ... direct reception," and that of Section 3(b)(2)(B) [of the Local Community Radio Act of 2010 ("LCRA")] which prohibits LPFM stations from causing "interference to the reception of an existing or modified full-service station," are essentially equivalent. The Commission previously has interpreted the "direct reception" language included in Section 73.1203(a) as limiting actionable complaints to those that are made by *bona fide* listeners. We believe it is appropriate to interpret the "reception" language in Section 3(b)(2)(B) of the LCRA as imposing this same limit.

Once the Commission receives a *bona fide* complaint of interference from an LPFM station operating pursuant to a second-adjacent waiver and notifies the LPFM station of the complaint, the LPFM station must

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<sup>4</sup> *Fifth Order on Reconsideration and Sixth Report and Order*, 27 FCC Rcd. 15402, 15428-29 (2012) (LPFM Sixth Report and Order).

“suspend operation immediately” and stay off the air until it eliminates the interference or demonstrates that the interference was not due to its emissions. We conclude that an LPFM station may demonstrate that it is not the source of the interference at issue by conducting an “on-off” test. “On-off” tests have been used by the FM translator and other services to determine whether identified transmissions are “the source of interference.” In addition, the Commission specifically authorized LPFM stations to use “on-off” tests for determining “whether [third-adjacent interference] is traceable to [an] LPFM station.” As the Commission did in that context, we require the full-service station(s) involved to cooperate in these tests.

(citations omitted)

5. In its initial response to the interference complaint from Red Wolf, the NRC Church noted that it was first granted a construction permit<sup>5</sup> for WYPH-LP on channel 273 on February 7, 2014. It filed a license application and commenced operation on that channel on May 8, 2014.<sup>6</sup> At that time, and to the present time, it was, and currently still is, short-spaced on second-adjacent channels to two full-power stations in the area, WAQY(FM) in Springfield, Massachusetts, and WDRC-FM. The NRC Church has never heard an interference complaint from anyone relative to reception of WAQY(FM), from May of 2014 to the present date. The NRC Church’s retained consulting engineer was, and is, Thomas R. Ray III of Tom Ray Broadcast Consulting, LLC. Mr. Ray was in 2014 also the consultant for the then-licensee of WDRC-FM. At the time that WYPH-LP went on the air, Mr. Ray conferred with WDRC-FM management, which had no concern about interference from WYPH-LP to reception of WDRC-FM whatsoever and experienced none. WYPH-LP operated from early February of 2014 until January 10, 2020, a period of six years, without any interference complaint whatsoever. The Audio Division says of this only that it does not matter when an interference complaint is filed temporally or

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<sup>5</sup> See, BNPL-20131024ACJ.

<sup>6</sup> See, BLL- 20140423ABG. The station was later relocated to the current site with a lower HAAT. See, BPL-2016-0128BFG and in 2016 it was licensed at the new site. See, BLL-20170807AAT.

geographically in a second-adjacent waiver situation. This is accurate, but it misses the point entirely. The point is to enquire whether there is a reason why *neither* second-adjacent full power FM station ever encountered or reported any interference over a six year period of harmonious second-adjacent operation, but when the current licensee of WDRC-FM comes in the door, all of a sudden, there appear multiple listener complaints. In order to evaluate whether or not the complaints are *bona fide*, this is a relevant inquiry. As the United States Court of Appeals has stated previously, the Commission is obligated to look for fire when shown a good deal of smoke.<sup>7</sup>

6. The NRC Church established also that the six complaints submitted by Red Wolf were all actively and repeatedly solicited on air by Red Wolf over a very long period of time. NRC Church noted that Red Wolf attacked WYPH-LP on air, and noted that it was in possession of audio recordings of announcements repeatedly made by Red Wolf on WDRC-FM which the Church offered to submit to the Division upon request, actively soliciting interference complaints from listeners of WDRC-FM, *specifically identifying WYPH-LP as the culprit and identifying the alleged locations of the supposed interference*. The verbatim text of a solicitation made on air on WDRC-FM on or about August 6, 2019 was provided by the NRC Church:

If you're a regular listener to 102.9 the whale WDRC, you may have noticed recent interference on your home radio or while driving listening in your car in Manchester in the vicinity of River of Life Church. 102.9 the whale listeners have experienced interference, particularly on Parker Street, Scott Drive, Sheldon Street, Middle Turnpike, Route 44 Vernon Street, North Main Street, Route 83 and Woodbridge Streets. You could be subject to interference from a new religious station, broadcasting from River of Life Church in Manchester. 102.9 the whale has had several complaints. You can help the whale protect its signal by signing a listener complaint letter to find out more. Call (860) 883-4292 that's (860) 883-

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<sup>7</sup> A Court of Appeals will intervene where the Commission failed to consider relevant factors, or made a manifest error in judgment. *Consumer Electronics Ass'n v. FCC*, 347 F.3d 291, 300 (D.C.Cir.2003).

4290 to prevent this new station from infringing on your listening rights to 102.9 the whale (860) 883-4292.

Of this, the Division said only that the NRC Church had not cited “any Rule prohibiting Red Wolf from broadcasting informational announcements on WDRC-FM concerning the interference or from preparing standardized interference complaint forms that are, as is the case here, reviewed and signed by the listener.” This again misses the entire point and glosses over what Red Wolf actually did. If the Commission wants interference complaints to not be submitted by *interested* parties but rather by *disinterested* listeners,<sup>8</sup> presumably because that requirement ensures that the complaints are objective and *disassociated with the complaining radio station*, why on Earth would the Division sit still for a radio station to (1) actively and repeatedly solicit interference complaints, (2) stating as fact that which had not yet been determined by the listeners for themselves, (3) providing the specific language for the complaints, and (4) conducting repeated, on-air broadcasts identifying what the radio station (*not* the listeners) thinks is the source of the interference? All of the information generated by Red Wolf found its way into the complaints, including the locations of the alleged interference. How can a complainant be alleged to be disinterested, and a complaint found to be *bona fide* if the entire scope of the complaint was solicited and scripted by the complaining radio station, where the language of the complaints<sup>9</sup> was provided to the alleged listeners by the radio station?

The crediting of the complaints in this instance as being *bona fide* on these facts is

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<sup>8</sup> See, *Association for Community Education*, Memorandum Opinion and Order, 19 FCC Rcd 12682, 12688 (2004).

<sup>9</sup> The Letter Decision, at 6, found that “New River fails to cite any Rule prohibiting Red Wolf from broadcasting informational announcements on WDRC-FM concerning the interference or from preparing standardized interference complaint forms (sic) that are, as is the case here, reviewed and signed by the listener.” If that is the position of the Audio Division, there is no point whatsoever in maintaining any pretense that *bona fide* complaints by disinterested parties are required in second-adjacent LPFM interference cases.

arbitrary and capricious and inconsistent with the Commission's holding in the LPFM *Sixth Report and Order*, and it should be reversed.<sup>10</sup>

7. The Audio Division obviously did *no* investigating of the Red Wolf interference complaint itself, or the nature of the listener complaints, notwithstanding the fact that there were no interference complaints for the prior six years of operation of WYPH-LP and notwithstanding the fact that the listener complaints were entirely, stem-to-stern, orchestrated by Red Wolf itself. Furthermore, Red Wolf was shown to have had a *very substantial motive to have created the interference allegations out of whole cloth*. Red Wolf was shown to hold a construction permit<sup>11</sup> for an unbuilt FM Translator, W273DS, which specifies operation on Channel 273 at Meriden, Connecticut, co-channel to WYPH-LP. When built, W273DS will rebroadcast a Red Wolf AM station in Meriden, Connecticut. However, the transmitter site and facilities specified in the construction permit for W273DS result in shortspacing to co-channel WYPH-LP by approximately 48

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<sup>10</sup> Indeed, it is difficult to imagine a more glaring example of contrived interference complaints. The complaints, but not the on-air solicitations, specifically identified the call letters of WYPH-LP as the source of the interference. The Division refused to inquire at all into a showing made by the NRC Church that at least one of the complaints written and scripted by Red Wolf was grossly misstated. The first complaint, supposedly dated June 6, 2018 and signed by Mr. Dave Chappell of 28 Springside Avenue, East Hartford, CT, alleged that he "is experiencing interference" to his "over-the-air reception of WDRC(FM) from WYPH-LP, on North Main Street, Oakland Street, Sheldon Road and at the Saint Bridget School in Manchester, CT." Mr. Chappell, an acquaintance of a member of the Church, corresponded with the Church member on the subject. When asked if he actually heard interference, Mr. Chappell replied to the Church member as follows: "I never heard enough to determine what was there just the music stopped and there were people having conversation." Mr. Chappell thus did not recall whether the *single incident* in which he noted some anomaly in audio reception was morning or afternoon, and he could not identify the source of the interference. There was not ongoing interference, as it turns out, merely a one-time, unidentified interruption in music programming, the source of which was and is *unknown* to the complainant, and which is much more likely explained as an error in the studio of WDRC-FM than by interference from WYPH-LP. However, the Division dismissed the showing, saying that a proffered text message from Mr. Chappell was not authenticated by the Church. It had no qualms, however, about accepting the Red Wolf-generated complaints as being *bona fide* without any similar burden being placed on Red Wolf. The application of different standards to evidentiary showings in this case thus far is disturbing.

<sup>11</sup> See, BNPFT-20180503AAL.

kilometers.<sup>12</sup> In order to overcome this shortspacing, Red Wolf included a directional antenna pattern with a very deep null in the signal contour of W273DS in the direction of Hartford and Manchester, Connecticut. It is not at all clear that an antenna could actually be designed to achieve this null. But for the presence of WYPH-LP, Red Wolf could let out the signal of the translator in the direction of the null, and cover the City of Hartford and the City of Manchester. Should Red Wolf put the FM translator on the air as specified in its construction permit (but without the null) atop Rattlesnake Mountain in Connecticut, it would provide a very strong signal over the entire city of Hartford on channel 273, virtually equivalent to a Class A FM. So the only chance that Red Wolf has to put W273DS on the air with coverage over the largest city in Connecticut and its surroundings would be *to get rid of WYPH-LP beforehand*. Red Wolf therefore was shown to have *every incentive and motive* to orchestrate a false interference complaint with respect to WYPH-LP.<sup>13</sup>

8. Though the Division wrote this showing off without investigation as being mere speculation on the part of the NRC Church, the fact is that the totality of the showing made by the NRC Church illustrates that Red Wolf, having a substantial motive and incentive to misrepresent the entire interference claim, in fact engineered the same

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<sup>12</sup> The allocation study associated with the application for the Red Wolf FM Translator shows that, at the site specified, W273DS is shortspaced to WYPH-LP by 47.98 kilometers.

<sup>13</sup> Further compelling evidence (ignored in the Letter Decision) that the motivation of Red Wolf has nothing whatsoever to do with interference, but instead is the major component of a scheme to cause WYPH-LP to lose its license and free up Channel 273 for Red Wolf's FM translator to let its pattern out so as to cover the City of Hartford and its urbanized surroundings is the fact that Red Wolf, attempting to achieve that precise outcome, made allegations in a reply pleading that which had *absolutely nothing to do with the interference allegation*. In a pleading styled *Opposition to Response* filed May 20, 2020, Red Wolf's program director submitted a series of alleged transcripts of sponsorship announcements allegedly aired on WYPH-LP which, without any support whatsoever, were alleged (falsely) to be commercials. There was *no possible reason for including this new, irrelevant material* except (1) to create prejudice against the Church; and (3) to begin an independent thread of allegations against the Church, in an effort to cause the Church's license to be revoked, thus to free up Channel 273 for Red Wolf's translator. The Audio Division made no reference to this illustrative action by Red Wolf in the Letter Decision.

itself, in a bad faith effort to cause WYPH-LP to be removed from Channel 273.<sup>14</sup> For the Division to have found that the interference complaints submitted by Red Wolf were *bona fide* on these facts, and the showings made by the NRC Church, without even the slightest inquiry into Red Wolf's machinations, is arbitrary and capricious<sup>15</sup> and contrary to the intent of the Commission in the LPFM *Sixth Report and Order*.

### **III. The Audio Division Erred in Failing to Evaluate the Engineering Showing of Independent Consulting Engineering Firm Tom Ray Broadcast Consulting, LLC**

9. By far the worst failure of the Letter Decision, however, is the Division's refusal to *even consider* the technical showing, timely made by independent consulting engineering firm Tom Ray Broadcast Consulting, LLC.<sup>16</sup> This showing demonstrated, using valid (and unchallenged) engineering methodologies, *that there is no interference from WYPH-LP to WDRC-FM in the areas specified by Red Wolf whatsoever*. The summary dismissal of the engineering showing by the Division deprived the NRC Church of its due process entitlement to show that WYPH-LP is not the cause of the interference, and it unlawfully elevated the interference complaints of Red Wolf to an irrebuttable presumption. At Paragraph 85 of the LPFM *Sixth Report and Order*, the Commission held that "(o)nce the Commission receives a *bona fide* complaint of interference from an LPFM station operating pursuant to a second-adjacent waiver and notifies the LPFM station of the complaint, the LPFM station must "suspend operation immediately" and stay off the air until it eliminates the interference *or demonstrates that the interference*

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<sup>14</sup> Such misconduct as harassment of opposing parties, which threatens the integrity of the Commission's licensing processes, will continue to be considered as bearing on character of a licensee. *Character Qualifications*, 102 F.C.C.2d 1205. The Commission terms this misbehavior "abuse of process." *Id.* at 1211.

<sup>15</sup> The Commission's judgment will not be sustained if it is so irrational as to be arbitrary or capricious. *California Public Broadcasting Forum v. FCC*, 752 F.2d 670, 679 (D.C. Cir. 1985).

<sup>16</sup> The Letter Decision erroneously referred to the firm as "Tom Ray Broadcasting, LLC".

*was not due to its emissions*”<sup>17</sup> (emphasis added). However, the entitlement to establish that the LPFM station is not in fact the cause of the interference presupposes the existence of a mechanism for doing so. In this case, what the NRC Church did is what literally *every other Commission licensee does and has done for decades* when faced with an accusation of being the cause of interference to another station: they engaged the services of a reputable, independent engineering consultant. As noted in the response of the NRC Church to the interference complaint, the NRC Church submitted<sup>18</sup> a statement from Tom Ray Broadcast Consulting, LLC (which is an independent engineering consulting firm located in New York State) reporting on the results of Mr. Ray’s investigation of the interference complaints, which the Church retained Mr. Ray to perform when it received the interference complaint in January. Mr. Ray on January 21, 2020 visited all four locations<sup>19</sup> where the interference was alleged to have occurred, each of which is near the transmitter site of WYPH (where interference on a second-adjacent FM channel would be expected to be the worst). He also drove essentially in a circumference around the WYPH-LP transmitter site. Mr. Ray checked the interference status at each of the locations specified in the complaints in two ways: he listened on a factory stock radio in a 2019 Nissan vehicle (and heard no interference at any time), and he watched the RBDS data decoded from a WDRC-FM broadcast, a normal, accurate method of assessing interference. WDRC-FM’s RBDS data at each location was not degraded *at all* by the nearby, second-adjacent signal of WYPH-LP. According to Mr.

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<sup>17</sup> *LPFM Sixth Report and Order*, 27 FCC Rcd. at 15248-9.

<sup>18</sup> See Exhibit B to the *Response To Interference Complaint and Request to Vacate Cease Operation Order* filed by the NRC Church April 29, 2020.

<sup>19</sup> Though there were in total five locations alleged to be areas in which interference was allegedly experienced by six complainants, *two of those complainants alleged interference at the same address, 375 Oakland Street* (which turned out to be a Chiropractor’s office), and the remainder cited similar or identical locations. There were, in all, four locations where interference was alleged to have occurred.

Ray: “at 57 kHz and only 3-6% injection level, if even slight interference is present, the RBDS data will generally become corrupted, stutter, display partial words and nonsense words. At no time did the RBDS data on WDRC-FM stutter, delay or corrupt in any way. The audio on this drive was solid with no interference heard to the WDRC-FM signal.” Finally, Mr. Ray reported that he went *to the transmitter site of WYPH-LP* and listened to WDRC-FM with no difficulty at all. If this can be done, there is *no possibility* that a complaint about WYPH-LP causing interference to WDRC-FM at a distance from the WYPH-LP site could be *bona fide*.

10. This engineering report from Mr. Ray should have been determinative. Mr. Ray is extremely well-respected in his field. He is a former Board Member of the Society of Broadcast Engineers, Incorporated and is SBE-certified in multiple engineering disciplines. Among these, he is a Certified Professional Broadcast Engineer. He is retained by numerous broadcast clients, and there was absolutely no rebuttal from Red Wolf of Mr. Ray’s findings. *Nor was there the slightest evaluation by the Audio Division of Mr. Ray’s engineering statement.* It was, instead, dismissed out of hand. The Letter Decision, at page 6, states categorically that “*We also decline to consider TRB’s interference test results because TRB was retained by New River and thus is not an independent party.*” It is impossible to understand this startling (and unique) holding, because it means that the NRC Church (and any other licensee of the Commission for that matter, faced with an interference allegation) is precluded from engaging a consulting engineering firm in order to resolve a disputed technical matter, because *even an independent consulting engineering firm is considered by the Audio Division to be biased in favor of their client and their work is summarily deemed unreliable.* If a

licensee is precluded from engaging an independent consulting engineer to conduct an analysis and fairly present the engineer's conclusions, simply because the licensee contracts for the engineering work with the engineering firm, how, precisely, is the licensee supposed to address the technical issue presented? What the Audio Division's stunning and unique holding does, is (a) it precludes any showing in an LPFM case (to name but one example) that the licensee accused of causing interference that it is in fact not the cause of any such interference experienced; and (b) it creates an irrebuttable presumption that the interference complaints are accurate; that there is interference, and that it is attributable to the accused licensee. There is literally no way for a licensee to rebut a technical allegation by showing that the accused station is not the cause of the alleged interference, without retaining a consulting engineering firm to do so. *Never before has the Commission taken the position that an engineering showing submitted in good faith by a consulting engineer, acting as an independent contractor, cannot be even considered or evaluated simply because the engineer was compensated for the work commissioned by the licensee in question.* That holding is arbitrary and capricious on its face, and in this case it constitutes treating similarly situated licensees differently, which the Commission cannot do.

11. The sole citation of authority for this startling holding is *Iglesia Jesucristo Es Mi Refugio, Inc.*, Memorandum Opinion and Order and Notice of Apparent Liability for Forfeiture, 25 FCC Rcd. 16310, 16319 (MB 2010), which supposedly held, as the Division would have it, that "petitioner's engineering consultant is not a disinterested witness". However, that case makes *no such broad holding* and it does not support the claim that an engineering analysis with respect to interference, prepared by an

independent consulting engineering firm, is to be discarded and not considered at all, simply because the accused licensee commissioned the independent consulting engineering firm. In the *Iglesia* case, which did not involve interference at all, the engineering consultant reportedly engaged in a conversation with a third party about a matter of fact, and the reporting of the engineer's statement on a matter of fact (not engineering), constituted hearsay. The case states that:

“We find that Haertig's (the engineer's) statements amount to unpersuasive hearsay. While hearsay that is relevant and material is admissible, for example, in administrative proceedings, the weight to be accorded it depends on its truthfulness, reasonableness and credibility. A prime indicium of probity is whether the declarants are disinterested witnesses. Here, we can accord little weight to Haertig's statements, because he is the petitioner's engineering consultant. Bilingue's failure to provide a timely declaration made under penalty of perjury from the tower owner or its representative and its reliance instead on the uncorroborated hearsay account of Haertig's conversation with Amrine, are fatal to its claim.” (footnotes omitted).

This case is completely irrelevant to the admissibility or the weight to be given a technical interference study prepared by an independent consulting engineering firm (in the nature of an expert witness) in an interference case before the Commission. There is nothing about Mr. Ray's engineering study that constitutes hearsay at all. He reported his own independent investigation and his findings, using accepted, normal methodologies.<sup>20</sup> The disqualification of all consulting engineering firms in these cases on the strength of the allegation that they are not “independent parties” is an absurdity. Since the Letter Decision takes this precise position, the NRC Church is clearly deprived of due process,

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<sup>20</sup> Lest the Division assert that the methodology used by Mr. Ray did not involve on-off testing, there is no obligation to use that methodology found anywhere in the Commission's Rules or in the LPFM Sixth Report and Order. At paragraph 85 thereof, the Commission made clear that the use of on-off interference tests in addressing second-adjacent interference allegations is permissive, non-exclusive, and not mandatory: “We conclude that an LPFM station may demonstrate that it is not the source of the interference at issue by conducting an ‘on-off’ test. ‘On-off’ tests have been used by the FM translator and other services to determine whether identified transmissions are ‘the source of interference.’” *LPFM Sixth Report and Order*, 27 FCC Rcd. at 15249.

because, upon the filing of interference complaints from listeners, there is *no remedy available* to the LPFM licensee that would allow the licensee to respond to it in any meaningful way, or to establish either that there is no actual interference, or that the accused LPFM station is not the source of the interference complained of. The complaining listeners are under no obligation whatsoever to cooperate with the accused LPFM, and there is no chance of providing an engineering rebuttal because no one retained by the Church can prepare and submit a response. This is an untenable situation and the NRC Church would suggest that it is simply wrong and should be reversed.

**IV. The NRC Church Proposes, Alternatively, that On-Off Testing be Conducted Immediately by a Third Party Engineering Consultant as a Means of Resolving this Matter Expeditiously.**

12. Section 73.809(d) and (e) of the Commission's Rules obligates the NRC Church to correct any condition of interference that results from the radiation of radio frequency energy outside its assigned channel and to not resume operation until the interference has been eliminated; subject, however, to conducting test transmissions during the period of suspended operation to check the efficacy of remedial measures. It is otherwise entitled to demonstrate that the WYPH-LP is not the cause of the alleged interference. The NRC Church is of the view that it has done the latter satisfactorily and that the Audio Division erred in several respects in failing to draw that same conclusion from the submissions made by the NRC Church to date. However, WYPH –LP has been off the air now for six months and it is urgent that the Manchester, Connecticut public not be further deprived of the programming from the station. So, in an effort to resolve this matter finally, without the further delay inherent in the Commission's adjudication of this Petition for Reconsideration, the NRC Church is willing, preferably with the participation

of Red Wolf but otherwise without, to retain an additional consulting engineer ( the identity of whom would preferably be agreed to by both parties and the fees of whom would be split equally between the parties) to conduct on-off testing at the locations of the alleged interference, and to submit the results of those tests to the Audio Division, which would presumably evaluate those results and finally resolve the dispute quickly thereafter. As noted above, Red Wolf has not as of this writing agreed to participate in this additional testing. If it does not ultimately so agree, the NRC Church would propose to conduct this testing unilaterally, and without prejudice to the instant Petition for Reconsideration, provided that the Audio Division agrees to evaluate substantively the on-off testing and not to discard the same merely because the additional consulting engineer has been retained by the NRC Church.

13. As noted above, the Commission has held that resolution of LPFM interference issues is akin to the process for addressing FM Translator interference allegations.<sup>21</sup> The Commission has just recently established standards for addressing FM translator interference to full power FM stations in Docket 18-119.<sup>22</sup> There, and in the LPFM Sixth Report and Order, the Commission notes that in most circumstances, a lack of interference can be demonstrated by on/off tests and/or field strength measurements at the relevant site. Rather than impose specific technical processes or parameters for such testing, the Commission requires that on-off tests and/or field strength measurements be conducted in a manner acceptable to both parties. Once agreement is reached, the parties must jointly submit the agreed-upon remediation showing to the Commission. If the parties fail to agree upon appropriate methods and technical parameters to be used for

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<sup>21</sup> See, the *LPFM Sixth Report and Order*, 27 FCC Rcd. at 15428, ¶¶ 77-78.

<sup>22</sup> *Amendment of Part 74 of the Commission's Rules Regarding FM Translator Interference*, 34 FCC Rcd 3457 (2019).

interference testing at a particular site or sites, the parties should engage a mutually acceptable third party engineer to observe or carry out the testing. In the FM Translator context, although the Commission anticipates that the parties will generally share the cost of engaging a neutral third party, it does not mandate the terms of that agreement.

Commission staff will make the final determination whether the interference has been resolved, or does not exist, based on the information requested and received from the third party engineer. At any point in the process the parties may agree that interference has been resolved using any mutually acceptable means.

14. The NRC Church proposes that, without prejudice to the arguments made in this Petition for Reconsideration, this same process be utilized in this case with a time limit imposed by the Audio Division. To that end, the NRC Church proposes to do one of two things, with the Audio Division's approval: (1) to retain, at shared cost with Red Wolf, a consulting engineer to be agreed on by both parties, to perform interference tests, and to provide her or his analysis to the Commission and to the parties. The cost of this third party engineer would be split between the parties hereto. (2) If Red Wolf is not willing to participate, the Church is also willing to have a third party, independent consulting engineer conduct the on-off tests with consulting engineers of each party's choice in attendance if desired, provided that the Audio Division will confirm that the results of the testing will be considered substantively by the Division and that the Division will not refuse to adjudicate this matter based on the on-off testing simply because the Church retained the engineering firm. The NRC Church would insist on a firm, and short, time frame<sup>23</sup> for the completion of the on-off testing and the completion

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<sup>23</sup> The Cease Operation letter has been devastating, not only for the congregation of the Church, which has been unable to conduct services during the pandemic, but for the Church itself. A cease operation order for

and submission of a report by whatever consulting engineer is retained. Unless the foregoing procedure is agreed to by either Red Wolf or the Audio Division, the NRC Church will proceed on the arguments contained herein and would request that adjudication of this Petition for Reconsideration be expedited. The NRC Church would also ask the Division to remind Red Wolf that refusal to participate in this course of testing would lead to adverse inferences. *Jay Ayer and Dan J. Alpert*, Letter, 23 FCC Rcd. 1879, 1883 (MB 2008) (requiring complainants to cooperate fully with a station's efforts to resolve interference claims and cautioning that the failure to do so could lead to a finding that the station has fulfilled its interference remediation obligations).

## **V. Conclusion.**

15. Given the foregoing, NRC Church respectfully requests that the Cease Operation letter of the Deputy Chief, Audio Division dated April 23, 2020 and the Letter Decision be vacated at the earliest possible opportunity; that WYPH-LP be permitted to return to the air; and that Church services can resume being broadcast to and received by the congregation of the Church during the pandemic who are confined to their homes and who deserve the opportunity to practice their religion during this unprecedented time. The NRC Church also requests that the Interference Complaint of Red Wolf Broadcasting Corporation be denied or dismissed based on the submissions made to date by the NRC Church, which demonstrate conclusively either that there never was any interference to WDRC-FM, or alternatively that WYPH-LP is not the source of any interference that

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an LPFM station, especially one that has been on the air for six years without incident and then is suddenly forced to cease operations, is far worse than for an FM translator. For a translator, being forced to cease operations, while costly, is not as impactful, as the translator is but a component of the broadcast operation, with the bulk of the income of the licensee coming from the full-power station that is being rebroadcast. For an LPFM, where there is no supporting primary station, being forced to cease operations is devastating, and results in the loss of donations and grants made to the licensee for the nonprofit operation of the station.

might have actually occurred. As an alternative to the foregoing, or if the Commission for any reason finds the submission of the NRC Church not determinative, then it is requested that the additional course of testing proposed hereinabove be approved by the Audio Division with the requested time limitations for completion and submission thereof. During the course of testing, obviously WYPH-LP must be permitted to resume operation, at least during the course of the testing.

Therefore, the foregoing considered, the New River Community Church asks that the Commission act in accordance with the foregoing, and not otherwise.

Respectfully submitted,

NEW RIVER COMMUNITY CHURCH

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