



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

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DA 15-855
In Reply Refer To:
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In re: WKMJ Radio Live The People Station
Inc.
New LPFM, Pinellas Park, Florida
Facility ID Number: 194483
File Number: BNPL-20131107AAI

Petition for Reconsideration

Dear Counsel:

We have before us the Petition for Reconsideration (“Petition”) filed by WKMJ Radio Live The People Station Inc. (“WKMJ”), seeking review of the Media Bureau (“Bureau”) decision¹ that dismissed its above-referenced application for a new LPFM station at Pinellas Park, Florida (“Application”). For the reasons set forth below, we deny the Petition.

Background. As discussed in the *Dismissal Letter*, the Bureau dismissed the Application because it found that Kervenson Joseph, the chief executive officer and a board member of WKMJ, had previously engaged in the unlicensed operation of a radio station in violation of Section 301 of the Communications Act of 1934, as amended (“Act”),² though Joseph had certified otherwise in the Application.³ The Bureau based this finding on an unsworn Pinellas Park Police Department report (“Case Report”), of which the Bureau took official notice,⁴ and concluded that this made Joseph ineligible for an LPFM authorization.⁵

¹ *LPFM MX Group 108*, Letter, Ref. No. 1800B3-ATS (MB Mar. 16, 2015) (“*Dismissal Letter*”).

² *Id.* at 3; 47 U.S.C. § 301.

³ Application, Section II, Question 8; *see also Creation of a Low Power Radio Service*, Second Report and Order, 16 FCC Rcd 8026, 8030 (2001) (“An applicant that responds ‘Yes’ to Question 8(a) but which is subsequently determined to have engaged in unlicensed station operations will be dismissed and subject to additional enforcement actions.”).

⁴ *Dismissal Letter* at 2. The Case Report indicates that officers from the Pinellas Park Police and Commission field agents discovered Joseph engaging in unlicensed transmissions at his office located at 6251 Park Boulevard, Pinellas Park, Florida.

⁵ *Id.* at 3, *citing* 47 C.F.R. § 73.854. (“No application for an LPFM station may be granted unless the applicant certifies, under penalty of perjury, that neither the applicant, nor any party to the application, has engaged in any manner including individually or with persons, groups, organizations or other entities, in the unlicensed operation of any station in violation of Section 301 of the [Act].”).

In the Petition, WKMJ argues that the Application should be reinstated because: (1) the Bureau erred in taking official notice of the facts in the “unsworn, unauthenticated” Case Report;⁶ (2) the Bureau failed to provide the Case Report to WKMJ and allow WKMJ an opportunity to respond;⁷ (3) the State Attorney for Pinellas County did not prosecute Joseph for this offense;⁸ and (4) “there has never been any kind of adjudication or finding by an administrative tribunal that [WKMJ] or its officers or directors violated Section 301 of the . . . Act.”⁹ WKMJ cites two federal court cases to support its assertion that “an unauthenticated police report may not be used to support a summary decision.”¹⁰

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.¹¹ WKMJ has not met this burden.

Unlicensed Operations. Section 632(a)(1)(B) of the Making Appropriations for the Government of the District of Columbia for Fiscal Year 2001 Act provides that the Commission must “prohibit any applicant from obtaining a low power FM license if the applicant has engaged in any manner in the unlicensed operation of any station in violation of Section 301 [of the Act].”¹² WKMJ does not dispute the findings in the Case Report, nor does it state that it has not engaged in unlicensed operation of a station in violation of Section 301. Rather, WKMJ only challenges the Bureau’s reliance on the Case Report in making its finding that WKMJ is ineligible to hold an LPFM license.

We find no basis to support WKMJ’s claims concerning official notice, because WKMJ’s Petition provided it with the opportunity to challenge the facts stated in the Case Report.¹³ In any event, the

⁶ Petition at 4-5.

⁷ *Id.* at 5-6.

⁸ *Id.* at 5. Pinellas County has jurisdiction to prosecute this action because the unauthorized transmission of a radio signal is illegal under Florida state law. *See* Fla. Stat. 877.27 (2013).

⁹ Petition at 5.

¹⁰ *Id.* at 4. WKMJ cites to *Hill v. Lazarou Enterprises, Inc.*, 2011 WL 124630 (S. D. Fla., January 14, 2011) and *Fox v. Michigan State Police Dept.*, 173 Fed. Appx. 372, 375 (6th Cir. 2006).

¹¹ *See* 47 C.F.R. § 1.106(c), (d); *see also* *WWIZ, Inc.*, Memorandum Opinion and Order, 37 FCC 685, 686 (1964), *aff'd sub nom. Lorain Journal Co. v. FCC*, 351 F.2d 824 (D.C. Cir. 1965), *cert. denied*, 387 U.S. 967 (1966).

¹² *See* Pub. L. No. 106-553, 114 Stat. 2762 (2000) (“Appropriations Act”). *See also* *Ruggiero v. FCC*, 278 F.3d 1323 (D.C. Cir. 2002), *rev'd en banc*, 317 F.3d 239 (D.C. Cir. 2003). *See also* *Creation of a Low Power Radio Service*, Second Report and Order, 16 FCC Rcd 8026, 8030 (2001) (implementing the Appropriations Act) (“*Second Report and Order*”); 47 C.F.R. § 73.854 (same).

¹³ Section 1.106(b)(1) of the Rules provides that any party to a Commission proceeding may file a petition requesting reconsideration of the action taken. This petition itself constitutes a fair opportunity to respond to officially noticed facts. *See Brainerd Broadcasting Co.*, Decision, 37 FCC 785, 787 n.4 (1964) (“Under 5 U.S.C. [556(e)] (APA) and 47 CFR 1.203, the parties are entitled to an opportunity to show the contrary of matters officially noticed. Timely filed petitions for reconsideration are a proper vehicle for the exercise of this right.”). Therefore, had the Bureau decided to rely only on official notice of the Case Report in finding that Joseph had engaged in the unlicensed operation of a radio station, the Petition would have served as WKMJ’s opportunity to respond to the facts in the Case Report with contradictory evidence. WKMJ’s failure to respond to the facts constitutes an independent basis for denying the Petition. *See* 47 C.F.R. § 1.106(d)(2) (“A petition for reconsideration of a decision that sets forth formal findings of fact and conclusions of law shall also cite the findings and/or conclusions which petitioner believes to be erroneous, and shall state with particularity the respects in which

Commission's own records confirm that Joseph engaged in unlicensed operation of a radio station. On December 19, 2013, the Commission's Enforcement Bureau ("EB") served a Notice of Unlicensed Operation ("NOUO") on Joseph.¹⁴ The NOUO shows that Joseph was operating a radio station in violation of Section 301:

On November 13 and 15, 2013, agents from this office confirmed by direction finding techniques that radio signals on frequency 102.1 MHz were emanating from a room within a business suite at 6251 Park Boulevard in Pinellas Park, FL. The Commission's records show that no license was issued for operation of a broadcast station on 102.1 MHz in Pinellas Park, FL. You were present at and allowed an inspection of the unlicensed station when it was on the air. You also voluntarily relinquished the station transmitter to the agents.¹⁵

EB did not receive a response from Joseph within the ten day period specified on the NOUO.¹⁶ Finally, we note that there is no requirement that an administrative agency make a formal finding that a party to an application has engaged in unlicensed operation of a radio station.¹⁷ Thus, the fact that Pinellas County exercised its prosecutorial discretion and did not prosecute Joseph is irrelevant to determining Joseph's eligibility to hold an LPFM license.¹⁸ Therefore, we find that the facts in the NOUO support our conclusion in the *Dismissal Letter* that Joseph has previously engaged in the unlicensed operation of a radio station in violation of Section 301. Accordingly, we deny the Petition and affirm our dismissal of the Application.¹⁹

Conclusion. We deny the Petition because it has not shown a material error in the Bureau's original decision, nor has it raised new or previously unknown facts that would change the disposition of the Application.

he believes such findings and/or conclusions should be changed. The petition may request that additional findings of fact and/or conclusions of law be made.”).

¹⁴ *Kervenson Joseph*, Notice of Unlicensed Operation (Enf. Bur. Tampa Office, December 19, 2013).

¹⁵ NOUO at 1.

¹⁶ *Id.* (“You have ten (10) days from the date of this notice to respond with any evidence that you have authority to operate granted by the FCC.”).

¹⁷ *See Second Report and Order*, 16 FCC Rcd at 8030 (2001) (“We note that the statutory language is not limited to applicants and licensees that have been found to have engaged in unauthorized operations by the Commission. Accordingly, an applicant will be ineligible to hold an LPFM license if it has engaged in unlicensed operation regardless of whether the Commission has made a specific finding that the party has engaged in such conduct.”).

¹⁸ Likewise, the Commission has prosecutorial discretion and the fact that it did not engage in forfeiture proceedings against Joseph does not cure WKMJ's ineligibility to hold a license. *See* 47 U.S.C. § 503; *see also Heckler v. Chaney*, 470 U.S. 821, 831 (1985) (“[A]n agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion.”).

¹⁹ We find the cases cited by WKMJ inapposite to the present circumstances. Those cases concern the admissibility of unauthenticated police reports under the Federal Rules of Evidence. The Commission's evidentiary rules for applications and pleadings outside of a designated hearing do not follow the Federal Rules of Evidence. *See In the Matter of Patrick Sullivan (assignor) and Lake Broadcasting, Inc. (assignee)*, Memorandum Opinion and Order, 29 FCC Rcd 5421 (MB 2014).

IT IS ORDERED, that the Petition for Reconsideration filed on April 13, 2015, by WKMJ Radio Live The People Station Inc. IS DENIED.

Sincerely,

Peter H. Doyle
Chief, Audio Division
Media Bureau