



Federal Communications Commission
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In Reply Refer To:
1800B3-TSN

Mr. Justin Howze
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In re: Capstar TX, LLC
(NEW) FM Translator, Modesto,
California
Facility ID No. 202581
File No. BNPFT-20181102AAJ

Petition to Deny

Dear Petitioner and Counsel:

Mr. Justin Howze (Howze) filed a November 18, 2018, Petition to Deny (Petition) the application of Capstar TX, LLC (Capstar) for a new cross-service FM translator station at Modesto, California.¹ For the reasons discussed below, we deny the Petition and grant the Application.

Background. Capstar filed the Application as part of the second new cross-service translator filing window, designated Auction 100, opened at the Commission's direction as part of the *AM Revitalization* proceeding.² Although the Commission initially determined Capstar's short-form application was mutually exclusive with another application, the mutually exclusive applicant withdrew its short-form application,³ and Capstar was directed to file a long-form (FCC Form 349) application for the Modesto translator. The Application was filed November 2, 2018, with Public Notice of the filing

¹ File No. BNPFT-20181102AAJ (Application).

² See *Revitalization of the AM Radio Service*, First Report and Order, Further Notice of Proposed Rule Making, and Notice of Inquiry, 30 FCC Rcd 12145, 12152-54, paras. 15-17 (2015) (*AMR First R&O*) (announcing two 2016 cross-service FM translator modification filing windows, to be followed by two 2017 auction filing windows for new cross-service FM translators, available to AM licensees and permittees that did not participate in 2016 modification windows).

³ Letter to Mr. Robert Gates, Audio Division, Media Bureau, from Andrew S. Kersting, Regulatory Counsel, Cumulus Licensing, LLC (May 31, 2018).

released November 7, 2018.⁴ Howze timely filed the Petition.⁵ Capstar filed an Opposition to Petition to Deny (Opposition) on December 4, 2018, with Howze filing a Reply to Opposition (Reply) on December 9, 2018.⁶

Howze argues, first, that Capstar neglected to file a preclusion study or otherwise demonstrate that the Application comports with Section 5 of the Local Community Radio Act of 2010.⁷ Specifically, he attaches studies purporting to show that grant of the Application would displace “one of two viable open LPFM channels” in spectrum-limited Modesto,⁸ and thus that grant of the Application would violate the LCRA because it does not preserve spectrum for a future LPFM station. Howze also contends that, because Capstar was in bankruptcy at the time it filed the Application, it lacks the financial resources to build a new translator, and thus the public interest militates against grant of the Application.⁹ Capstar, in Opposition, argues that Howze is in essence filing a tardy petition for reconsideration of the *AMR First R&O*, in which the Auction 99 and 100 procedures were adopted, and thus that his complaint is against the procedures generally, not the Application specifically.¹⁰ Capstar also cites a 2018 Media Bureau decision in which the staff pointed out that Section 5 of the LCRA requires that the Commission, not the applicant, ensure that the LCRA’s mandates are met, and that Capstar followed all of the procedures set forth for applicants in the cross-service translator auction.¹¹ In Capstar’s view, Howze may not exact additional demands of it beyond what was required by the Commission.¹² Capstar further argues that nothing in its Chapter 11 reorganization plan prevents it from continuing to conduct business, including establishing a new cross-service translator at Modesto.¹³ In his Reply, Howze reiterates his position that the procedures utilized in Auction 99 and 100 are contrary to the mandate of Section 5 of the LCRA, and that this is the case regardless of whether a rulemaking proceeding has concluded.¹⁴

Discussion. Bankruptcy. At the outset, we reject Howze’s contention that the Application must be dismissed due to Capstar’s bankruptcy. First, in a Chapter 11 reorganization, the debtor in possession is empowered to operate the bankrupt’s business while it reorganizes.¹⁵ Second, as Capstar points out, the applicant is the same as the licensee of the primary AM station (WFIV) that filed the Application. The only reason the appellation “as debtor in possession” was not originally appended to the applicant name was that the short-form application for the Modesto Translator was filed prior to Capstar’s filing for

⁴ *Broadcast Applications*, Public Notice, Report No. 29358 (MB Nov. 7, 2018).

⁵ See 47 CFR § 73.5006(b).

⁶ Capstar amended the Application on June 26, 2019, to reflect the reorganized Capstar TX, LLC, that emerged from bankruptcy proceedings.

⁷ Pub. L. 111-371, 124 Stat. 4072 (2011) (LCRA).

⁸ Petition at 4.

⁹ *Id.* at 4-5.

¹⁰ Opposition at 3-4.

¹¹ Opposition at 4-5, citing *Center for International Media Action, Common Frequency, Inc., and Prometheus Radio Project*, 33 FCC Rcd 5394 (MB 2018) (*June Translator Decision*).

¹² Opposition at 4-5.

¹³ *Id.* at 6-7.

¹⁴ Reply at 2-6.

¹⁵ See, e.g., *Czyzewski v. Jevic Holding Corp.*, 137 S.Ct. 973, 978, 197 L.Ed.2d 398 (2017) (citing 11 U.S.C. §§ 363(c)(1), 1108).

Chapter 11 protection.¹⁶ Finally, Capstar has recently emerged from bankruptcy, and the reorganized entity is no longer a debtor in possession.¹⁷ Howze's argument is therefore moot, and there is no reason to dismiss the Application based on Capstar's bankruptcy.

LCRA Section 5. The gravamen of Howze's Petition is that the Application does not comport with the dictates of Section 5 of the LCRA (Section 5), in that it proposes a new translator in a market where there are more translators than LPFM stations, and thus that the needs of the local community have not been taken into account. As discussed below, we find that Capstar's Application conformed to the procedures established for Auction 100, and further that the Auction 100 procedures comport with Section 5.

We reject Capstar's assertion that Howze may not object to the Auction 100 procedures after the time for filing petitions for reconsideration of the order adopting those procedures has elapsed. It has long been established that, "unlike ordinary adjudicatory orders, administrative rules and regulations are capable of continuing application; limiting the right of review of the underlying rule would effectively deny many parties ultimately affected by a rule an opportunity to question its validity."¹⁸ Howze has standing to file the Petition, as he is a resident of the area in which the proposed new translator can be heard.¹⁹ He was not, however, expected to predict at the time the *AMR First R&O* was released that he would be directly affected by an application to be filed pursuant to the procedures announced in that order. Thus, his petition is not untimely.

We therefore review the procedures set forth for the AMR filing windows, Auctions 99 and 100, to determine whether they comport with Section 5. Section 5 by its terms requires that, when licensing new FM translators, boosters, or LPFM stations, the Commission must ensure: (1) that licenses are available to FM translator stations, LPFM stations, and FM booster stations; (2) that licensing decisions are made based on the needs of the local community; and (3) that FM translator stations, LPFM stations, and FM booster stations remain equal in status and secondary to existing and modified full-service FM stations. It is through this lens that we examine the Auction 99 and 100 filing procedures.

Howze, however, contends that we must examine these procedures through a different lens, namely, what we termed the "extraordinary *ad hoc* processing measures" the Commission established in the context of disposing of over 13,000 new translator applications filed in Auction 83, while preserving sufficient spectrum to open a subsequent LPFM window.²⁰ It bears noting that neither the processing measures adopted in the *LPFM Fourth R&O* nor those adopted in the subsequent *AMR First R&O*, although both subjected to notice-and-comment rulemaking procedures, were codified. This is because neither set of procedures was considered to be of general applicability in applying the dictates of Section

¹⁶ File No. BNPFT-20180130AEG. See Opposition at 5-6 and n.12. Additionally, Capstar has provided evidence to show that it has sufficient funds on hand to construct the translator applied for. Opposition, Attachment A.

¹⁷ See *supra* note 6.

¹⁸ *Functional Music, Inc. v. FCC*, 274 F.2d 543, 546-47 (D.C. Cir. 1958), *pet. for reh'g en banc denied* (Jan. 15, 1959), *cert. denied*, 80 S.Ct. 50 (1959).

¹⁹ Petition at 1 and Appx B.

²⁰ *June Translator Decision*, 33 FCC Rcd at 5396, citing *Media Bureau Announces January 10 - January 25, 2013 Filing Window for Auction 83 FM Translator Application Selections and Caps Showings*, Public Notice, 27 FCC Rcd 15961 (MB 2012) (*Cap Public Notice*); *Media Bureau Offers Examples to Clarify Auction 83 FM Translator Application Selections and Cap Showings Requirements*, Public Notice, 28 FCC Rcd 98 (MB 2013). See also *Creation of a Low Power Radio Service*, Fourth Report and Order and Third Order on Reconsideration, 27 FCC Rcd 3364, 3372, para. 18 (2012) (*LPFM Fourth R&O*).

5 to all new secondary service licensing. Rather, each set of procedures was responsive to the unique circumstances and public interest considerations underlying a particular filing window.

In the case of Auction 83, 13,377 new FM translator applications were filed by any party wishing to do so, without restriction on the number of applications filed by any one applicant, the location of the proposed translator(s), or the alienability of the authorization.²¹ Grant of all or a significant portion of these applications would have severely depleted spectrum available to other secondary services, including LPFM. By 2011, eight years after the Auction 83 window opened, Congress enacted the LCRA, to guard against such spectrum depletion. Thus, faced with an unprecedented volume of translator applications filed in the general Auction 83 window, the Commission introduced extraordinary remedial measures, including limiting the number of filed applications that applicants could continue to prosecute, and requiring applicant-filed preclusion studies, all to preserve spectrum for future LPFM stations.²²

As a result of the severe restrictions placed on Auction 83 applicants, 5,450 new translator permits were awarded, out of a theoretical maximum of 13,377, or 40.7 percent. This enabled the October-November 2013 LPFM filing window,²³ in which 1,994 out of a total of 2,827 new LPFM station applications filed (70.5 percent) were granted.

In 2013, the Commission initiated the *AM Revitalization* proceeding.²⁴ The Commission observed that listenership of AM stations—the earliest broadcast service—had decreased due to various factors, including the availability of higher-fidelity listening options, inter-station interference, and environmental interference (e.g., computers, LED bulbs, etc.).²⁵ Notwithstanding the decline in listenership, the Commission stressed the importance of AM stations to the communities they serve:

Today, AM radio remains an important source of broadcast entertainment and information programming, particularly for locally oriented content. AM broadcasters provide unique, community-based programming to distinguish themselves from other media sources in an increasingly competitive mass media market. (citation omitted) For example, all-news/talk, all-sports, foreign language, and religious programming formats are common on the AM band. Indeed, over 90 percent of all news/talk stations operate on the AM band. (citation omitted) Local programming is also prevalent on the AM dial, including discussions of local news, politics and public affairs, traffic announcements, and coverage of community events such as high school athletic contests.²⁶

Thus, in the *AMR NPRM*, the Commission emphasized not just the value of AM programming generally, but specifically the value of such programming to the local communities served by AM

²¹ See *Creation of a Low Power Radio Service*, Fifth Order on Reconsideration and Sixth Report and Order, 27 FCC Rcd 15402, 15404, para. 4 (2012) (*LPFM Fifth R&O*) (noting that 40 percent of FM translator permits initially awarded in Auction 83 window were assigned to non-applicants, and that co-owned filers of the largest number of applications sought to assign more than 50 percent of the construction permits they received).

²² See generally *LPFM Fourth R&O*, 27 FCC Rcd at 3382-88, paras. 38-49; *LPFM Fifth R&O*, 27 FCC Rcd at 15404-07, paras. 4-13 (discussing need for application caps).

²³ See, e.g., *Media Bureau Announces Availability of the Revised FCC Form 318 and the Filing Procedures for October 15 – October 29, 2013, Low Power FM Filing Window*, Public Notice, 28 FCC Rcd 8854 (MB 2013).

²⁴ *Revitalization of the AM Radio Service*, Notice of Proposed Rule Making, 28 FCC Rcd 15221 (2013) (*AMR NPRM*).

²⁵ *Id.* at 15222-23, paras. 4-6.

²⁶ *Id.* at 15222, para. 3.

stations. It then proposed several measures designed to revitalize the AM band generally and assist existing AM broadcasters specifically. The latter category included a proposal to open a filing window during which AM station licensees could apply for a fill-in cross-service FM translator, with a cap of one translator application per AM station. Each such translator would be permanently linked to the AM primary station that it rebroadcast—the proposed translator could not be assigned or transferred except in conjunction with the AM primary station that licensed it. The Commission sought comment as to the effect of such a window on other services, including LPFM,²⁷ and specifically noted its belief that “a narrowly tailored filing window for such FM translators, as proposed above, could yield significant public interest benefits with little to no detriment either to the FM translator service or to licensing opportunities for LPFM stations, especially since the filing window proposed here will follow the 2013 LPFM filing window.”²⁸

The proposal to open a new cross-service FM translator window exclusively for AM stations met with overwhelming,²⁹ though not universal,³⁰ commenter approval. In the *AMR First R&O*, the Commission ordered, first, two filing windows for AM licensees wishing to purchase and modify existing FM translators to use as cross-service translators, followed by two auction windows for new cross-service FM translators, which have since been designated Auctions 99 and 100.³¹ The Commission limited participation in the Auction 99 and 100 windows to those AM station licensees that had not already participated in a modification window.³² This restriction reduced the number of new translator applications that could be filed, as many AM broadcasters opted to modify and relocate an existing FM translator rather than apply for a new one. Although some commenters expressed concern about the effect of the new cross-service FM translator auction windows on licensing opportunities for other secondary services,³³ none sought reconsideration of the tailored window-specific eligibility requirements and adopted filing procedures.³⁴

In short, the procedures adopted for the AMR filing windows, like those adopted following the Auction 83 filing window, were designed to strike a balance between the stated goals of the *AM Revitalization* proceeding and the need to preserve spectrum for future applicants. First, the Commission limited participation to AM station licensees and permittees on a one-per-AM station basis, thus effectively capping the potential number of applications at 4,684 (the number of AM stations at the

²⁷ *Id.* at 15228, para. 17.

²⁸ *Id.* at 15229, para. 18.

²⁹ See *AMR First R&O*, 30 FCC Rcd at 12149-50, para. 10.

³⁰ See *id.* and nn. 25-28. See also Comments of Common Frequency, Inc., filed in MB Docket No. 13-249 (Jan. 6, 2014) (CFI Comments).

³¹ *AMR First R&O*, 30 FCC Rcd at 12152-54, paras. 15-17.

³² *Id.* at 12153, para. 17.

³³ *Id.* at 12150 n.28; CFI Comments.

³⁴ Prometheus Radio Project (Prometheus) did seek reconsideration of the Second Report and Order in the *AM Revitalization* proceeding, *Revitalization of the AM Radio Service*, Second Report and Order, 32 FCC Rcd 1724 (2017) (*AMR Second R&O*), in which the “fill-in” area for cross-service FM translators was expanded from the lesser of the AM primary station’s daytime 2 mV/m contour or a 25-mile radius centered at the AM transmitter, to the greater of those areas. Prometheus argued that the Commission’s failure to adopt a set distance limit from an AM transmitter for siting cross-service FM translators would negatively impact LPFM stations and their ability to relocate. That petition was denied by the Commission. *Revitalization of the AM Radio Service*, Order on Reconsideration, 33 FCC Rcd 5082 (2018).

time).³⁵ Second, translators were required to operate on a fill-in basis only, thus restricting the area in which such a translator could be located.³⁶ Third, the introduction of a modification window, allowing AM broadcasters to move an existing FM translator up to 250 miles rather than add a new FM translator, further limited the number of potential new FM translator grants, as modification window participants were precluded from participating in Auction 99 or 100. Finally, new translators awarded through the Auction 99 and 100 filing windows may not be assigned or transferred except in conjunction with the AM primary station by which it is owned, and may not rebroadcast any other station, thus limiting the extent to which it can be moved and precluding potential interference with other secondary station licensing opportunities.

The end result of these restrictions is that no more than 1,707 new cross-service FM translators have been or can be granted as a result of the Auction 99 and 100 filing windows, out of a theoretical maximum of 4,684, or just under 37 percent. This is comparable to the percentage of new translator grants from the Auction 83 window, vis-à-vis the original number of applications, suggesting that the restrictions placed on Auction 99 and 100 applicants were equally efficacious in terms of overall spectrum preservation.

To the extent that Howze argues that Section 5 requires a market-by-market evaluation of secondary spectrum availability, or prohibits further award of FM translator construction permits in markets where translators outnumber LPFM stations, we reiterate that nothing in the language of Section 5 mandates such specific measures. It requires only that the Commission ensure that licensing opportunities are available for all secondary services, that its licensing decisions are made based on the needs of the local community, and that all secondary services remain equal in status (not number) and secondary to full-service FM stations. The Auction 99 and 100 procedures are in full compliance with Section 5's dictates. Applications were capped at one per AM station (as opposed to allowing multiple translator grants) and further capped by forcing applicants to choose between modifying an existing translator or applying for a new one, thus ensuring that new translators awarded through these windows would not consume all available spectrum. Every new translator was awarded to assist an existing AM station. Because the Commission has found that AM stations provide uniquely local service in many instances, the needs of local communities were considered, and such communities will benefit by expanding AM service into areas and dayparts that local AM stations cannot currently provide, with better signal quality. Finally, nothing in the Auction 99 or 100 procedures elevates new cross-service FM translators to higher status than LPFM stations, and in fact the siting and alienability restrictions on these new translators in many cases give them less flexibility than previously authorized FM translators and LPFM stations.

Section 5 does not, by its terms, mandate that the same drastic spectrum-preservation measures adopted in Auction 83 be used in Auctions 99 and 100, just as it does not require that the same measures adopted in Auctions 99 and 100 be used in subsequent FM translator or LPFM windows.³⁷ The Commission must make public interest decisions for all aural services, and these decisions always involve a balancing of interests. The prevailing interest in Auction 83 was to prevent an extraordinary number of FM translator applications from absorbing all available secondary service spectrum. In Auctions 99 and

³⁵ The current total of AM stations, as of December 31, 2018, is 4,619.

³⁶ When the *AMR First R&O* was adopted this area was further restricted to the lesser of the AM primary's daytime 2 mV/m contour or a 25-mile radius. It was later expanded in the *AMR Second R&O*.

³⁷ We also note, as we did in the *June Translator Decision*, 33 FCC Rcd at 5398, that Section 5 by its terms gives to the Commission, not the applicant, the responsibility of ensuring availability of licenses for secondary services. Capstar, as it argues in its Opposition, followed all Commission procedures set forth for Auction 100 applications. *See supra* note 11.

100, the prevailing interest was to enable AM stations to expand and improve the service they provide to their communities. Were we to impose the extreme market-by-market limits used in Auction 83 that Howze demands, we could severely dilute—if not undercut completely—the public interest benefits to local markets served by AM stations that the Commission sought to implement in the *AMR First R&O*.³⁸

We therefore reject Howze’s contention that the procedures set up for Auction 83 must be utilized in all subsequent secondary service filing windows. We find that the Commission’s procedures for Auctions 99 and 100, adopted after notice and comment, comport with Section 5 while serving the stated public interest rationale for the auction filing windows. Accordingly, we deny the Petition.

Capstar application. We have examined the Capstar Application, and are satisfied that Capstar is fully qualified to be a Commission licensee, and that grant of the Capstar Application is in the public interest, convenience, and necessity.

Conclusion. For the foregoing reasons, the Petition to Deny filed by Justin Howze IS DENIED, and the Application of Capstar TX, LLC, for a new FM translator station at Modesto, California, File No. BNPFT-20181102AAJ, IS GRANTED.

Sincerely,

Albert Shuldiner
Chief, Audio Division
Media Bureau

³⁸ *Cf. Nat’l Ass’n of Broadcasters v. FCC*, 569 F.3d 416, 425 (D.C. Cir. 2009) (noting that while Commission’s engineering judgment regarding interference from LPFM stations to full-service FM stations did not change, it reevaluated the competing priorities of interference protection and preserving existing service in the face of changed circumstances).