



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

DA 23-542

In Reply Refer to:

1800B3-ALV

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In re: **W239CL, Golden Gate, FL
Fort Myers Broadcasting Company
Facility ID No. 139116
File No. 0000120834**

**Application for License
Petition for Reconsideration/Interference
Complaint**

Dear Counsel and Petitioner:

We have before us a Petition for Reconsideration (Petition), filed by Dwayne Williams d/b/a Sumarrase, Inc. (Sumarrase), licensee of WSGD-LP, Lehigh Acres, Florida, and responsive pleadings.¹ Sumarrase seeks reconsideration of the grant by the Audio Division, Media Bureau (Bureau) of the

¹ Petition for Reconsideration of Sumarrase, Pleading File No. 0000124025 (Oct. 6, 2020); Opposition to Petition for Reconsideration (Opposition), filed by Fort Myers Broadcasting Company (FMBC), Pleading File No. 0000124701 (Oct. 15, 2020); Sumarrase Reply to Opposition (Reply), Pleading File No. 0000125099 (Oct. 27, 2020); FMBC Motion for Leave to File, Pleading File No. 0000125498 (Nov. 4, 2020); FMBC Motion for Leave to Dismiss Reply to Opposition, Pleading File No. 0000125502 (Nov. 4, 2020); Sumarrase Opposition to Motion to Dismiss, Pleading File No. 0000125689 (Nov. 9, 2020); FMBC Reply to Opposition to Motion to Dismiss, Pleading File No. 0000125979 (Nov. 13, 2020); and Sumarrase "Final Reply to any FMBC to FCC Motions," Pleading File No. 0000126454 (Nov. 19, 2020). In addition, between February 5, 2021, and March 5, 2021, Sumarrase sent several emails to Bureau staff regarding further allegations against FMBC. Bureau staff subsequently notified Sumarrase that the emails, which were not served on the other party to this proceeding, were prohibited *ex parte* communications.

above-referenced covering license application (License Application)² for FM Translator Station W239CL, Golden Gate, Florida. For the reasons discussed below, we dismiss the Petition and uphold the grant of the License Application.

Background. On February 28, 2020, Fort Myers Broadcasting Company (FMBC), the licensee of FM Translator Station W239CL, filed an application for a minor modification to change the W239CL licensed transmitter site and modify its facilities.³ The Bureau granted this uncontested application on March 13, 2020. On August 27, 2020, FMBC filed the subject license application to cover the modified W239CL permit.⁴ The License Application was granted on September 25, 2020.⁵

On October 6, 2020, Sumarrase filed its Petition for Reconsideration of the grant of the W239CL license application, arguing that W239CL causes interference to Sumarrase's "previously authorized" co-channel LPFM station WSGD-LP, Lehigh Acres, Florida. To support its interference claim, Sumarrase submits (1) maps showing the specific locations of interference inside the 45 dBu contour; (2) a package of 13 listener complaints "covering 21 qualifying locations within the WSGD-LP 45 dBu contour"; and (3) a declaration from an engineer, Steven L. White, certifying that he "calculated the U/D ratios and prepared the maps in the exhibit."⁶

Sumarrase explains that it previously sent its listener complaints of interference to FMBC, and on September 23, 2020, FMBC responded by accusing Sumarrase of operating high power facilities and requested that Sumarrase provide a detailed engineering statement and open WSGD-LP for inspection by FMBC.⁷ Sumarrase states that it subsequently reiterated to FMBC that "it is operating within its authorized parameters to make 22 ERP at 200 feet" and denied FMBC access to its transmitter site due to a pending motion "related to earlier unauthorized access by FMBC employees."⁸ Sumarrase urges the Bureau to require FMBC to cease operation of its FM translator station until it can resolve the demonstrated interference. If FMBC cannot resolve the interference, Sumarrase requests that the Bureau reconsider and deny the W239CL license application.

In its Opposition, FMBC argues that the Petition is both procedurally and substantively deficient. Specifically, FMBC argues that the Petition is procedurally defective because it does not conform to the requirements of section 1.106 of the Commission's rules.⁹ FMBC asserts that Sumarrase fails to explain why it waited until after the grant of the License Application to raise its interference allegations¹⁰ and that the Petition is part of Sumarrase's "pattern of abusive reconsideration filings."¹¹ FMBC contends that the

² See Application File No. 0000120834, granted September 25, 2020.

³ See Application File No. 0000106772.

⁴ See *Applications*, Public Notice, Report No. PN-1-200831-01 (August 31, 2020).

⁵ See *Actions*, Public Notice, Report No. PN-2-200929-01 (September 29, 2020).

⁶ See Petition at 2 and Exhibit 1.

⁷ *Id.* at 1-2.

⁸ *Id.* at 2. See also *Sumarrase, Inc. v. Fort Meyers Broadcasting Co.*, Circuit Court of the Twentieth Judicial Circuit, Lee County, Florida, Case No. 202-CA-004070 (June 22, 2020). Sumarrase states that on September 25, 2020, its tower landlord notified it that FMBC was attempting to gain access to WSGD-LP. The case was dismissed without prejudice on November 30, 2020.

⁹ See 47 CFR § 1.106.

¹⁰ Objection at 1.

¹¹ *Id.* at 2. See Pleading File Nos. 0000106515 (February 24, 2020); 0000108726 and 0000108741 (March 23, 2020); 0000119563 (July 31, 2020); 0000120308 (August 11, 2020); 0000120661 (August 31, 2020); and

Petition is also substantively deficient because (1) the Petition violates section 74.1203(a)(3) of the rules;¹² (2) Sumarrase neither constructed nor operated authorized facilities for WSGD-LP;¹³ and (3) grant of the W239CL license application did not increase interference to WSGD-LP.¹⁴

In its Reply, Sumarrase asserts that its Petition is timely because it is “plainly obvious that ‘actual interference’ cannot be identified until an interfering translator is on the air.”¹⁵ Sumarrase also states that WSGD-LP is the “earlier authorization for interference consideration”¹⁶ and refutes FMBC’s accusation that WSGD-LP was improperly constructed and operated.¹⁷

Discussion. We dismiss the Petition as procedurally defective. 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.¹⁸ If the petitioner is not a party to the proceeding, it must state with particularity the manner in which its interests are adversely affected and show good reason why it was not possible to participate in the earlier stages of the proceeding.¹⁹

0000124025 (October 6, 2020). These pleadings, seeking reconsideration of the grant of the W239CL renewal application due to alleged interference to WSGD-LP, were dismissed on December 10, 2020. *See* Letter from Albert Shuldiner, Chief, Audio Division to Sumarrase, Inc., Ref. 1800B3-SS (finding, *inter alia*, that Sumarrase lacks standing to request reconsideration, its lone declaration is not probative that W239CL will interfere with WSGD-LP, and Sumarrase’s petitions were not accompanied by an affidavit or declaration from a qualified engineer, as required by section 1.106(e) of the rules, and other information that the Commission requires for a valid and actionable interference claim).

¹² 47 CFR § 74.1203(a)(3) (prohibiting an authorized FM translator station to continue to operate if it causes any actual interference to “the direct reception by the public of the off-the-air signals of any full-service station or previously authorized secondary station”). FMBC states that W239CL was first authorized in 2007, more than 10 years before WSGD-LP applied for its initial license, and therefore Sumarrase’s claim that WSGD-LP is a “previously authorized station” is untrue. *See* Opposition at 2.

¹³ Opposition at 3-4. FMBC alleges that Sumarrase operates its station above its authorized power using an unauthorized antenna. *Id.*

¹⁴ *Id.* at 4-5. *See also* Technical Exhibit to Opposition (explaining that the purpose of the exhibit is to “demonstrate that W239CL’s currently licensed facilities are predicted to cause less interference to WSGD-LP than W239CL’s previously licensed facilities (File No. BLFT-20170412AAL).”).

¹⁵ Reply at 2.

¹⁶ *Id.* at 2.

¹⁷ *Id.* at 3-5. On November 4, 2020, FMBC filed a “Motion to Dismiss Reply to Opposition,” arguing that the Sumarrase Reply violates section 1.52 of the rules and must therefore be dismissed without further consideration. We disagree. Section 1.52 of the rules states that “[t]he original of all petitions, motions, pleadings, briefs and other documents filed by any party represented by counsel shall be signed by at least one attorney of record in his individual name, whose address shall be stated. A party who is not represented by an attorney shall sign and verify the document and state his address.” *See* 47 CFR § 1.52. Sumarrase is not represented by counsel, but the Commission’s database indicates that Dwayne Williams, the owner of Sumarrase, Inc., signed and verified the Reply and stated his address. Accordingly, Sumarrase did not violate section 1.52 of the rules, and we find no reason to dismiss or otherwise disregard the Sumarrase Reply.

¹⁸ *See* 47 CFR § 1.106(c), (d); *see also* *WWIZ, Inc.*, Memorandum Opinion and Order, 37 FCC 685, 686, para. 2 (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).

¹⁹ *See* 47 CFR § 1.106(b)(1).

Although from early 2020, Sumarrase filed numerous complaints and petitions against FMBC, regarding the alleged interference W239CL causes to WSGD-LP,²⁰ Sumarrase failed to object to the W239CL modification application²¹ or contest the License Application. During the six-month period from the February 2020, filing of the W239CL modification application to the subsequent, August 2020, submission of the License Application, Sumarrase could have presented information regarding the predicted interference, but neglected to do so.²² We find that Sumarrase was not a party to the proceeding and has not justified its failure to participate earlier. Further, we note that the FMBC License Application is entitled, under section 319(c) of the Communications Act of 1934, as amended,²³ to a high degree of protection and a presumption that the public interest determination made during the underlying construction permit proceedings continues in effect unless extraordinary circumstances²⁴ have arisen that would make operation of the translator against the public interest.²⁵ Sumarrase has not demonstrated good cause to deviate from the stringent section 319(c) mandate.

Moreover, we note that even if we were to consider the Petition on its merits, we would deny it. To present an actionable claim of interference, a complainant must submit, *inter alia*, (1) the required minimum number of valid listeners complaints;²⁶ (2) a map plotting the specific location of the alleged interference in relation to the complaining station's 45 dBμ contour; and (3) a statement that the complaining station is operating within its licensed parameters.²⁷ On the surface, Sumarrase appears to provide the requisite information for a valid translator interference claim package, including, a statement that it operates WSGD-LP within its licensed parameters. A station, *if* operating according to its licensed parameters, is entitled to protection from interference.

WSGD-LP is licensed to operate with a one-bay, Shively model 6812B-1, nondirectional antenna at a maximum ERP of 22 watts and TPO of 22 watts.²⁸ FMBC claims that Sumarrase “neither constructed nor operated FCC-authorized facilities for WSGD-LP,”²⁹ and it, *inter alia*, “utilized an antenna that differed from its authorized antenna” and “operated with transmitter power output (TPO)

²⁰ See, e.g., Pleading File Nos. 0000106515 (February 24, 2020); 0000108726 and 0000108741 (March 23, 2020); see also *supra* note 8.

²¹ See *supra* note 3.

²² See *Amendment of Part 74 of the Rules Regarding FM Translator Interference*, Report and Order, 34 FCC Rcd 3457 (2019) (establishing technical criteria to assess predicted interference and procedures for filing predicted interference claims); 47 CFR § 74.1204(f).

²³ 47 U.S.C. § 319(c) (requiring the Commission to issue a license where a construction permit has been granted, and it appears that the terms of such permit have been met, and “that no cause or circumstance arising or first coming to the knowledge of the Commission since the granting of the permit would, in the judgment of the Commission, make the operation of such station against the public interest ...”).

²⁴ See, e.g., *Whidbey Broadcasting Service, Inc.*, Memorandum Opinion and Order, 4 FCC Rcd 8726, 8727 (1989).

²⁵ The Commission traditionally is reluctant to designate license applications for hearing, and in most cases, considers the grant of the license application to follow almost automatically from the issuance of the construction permit and completion of construction. See, e.g., *Meyer Broad. Co.*, Memorandum Opinion and Order, 65 FCC 2d 438, 441, para. 9 (1977).

²⁶ See 47 CFR § 74.1203(a)(3).

²⁷ *Id.*

²⁸ See File No. BLL-20180104AAH.

²⁹ Opposition at 3. FMBC alleges that the “technical portion of the WSGD-LP license application was a complete fiction.” *Id.*

levels that exceeded the authorized TPO.”³⁰ Although Sumarrase repeatedly refutes FMBC’s claim and insists that “WSGD-LP was properly constructed and is properly operated,”³¹ it conversely concedes that it did not install the one-bay antenna authorized in its license.³² Specifically, Sumarrase explains that it:

“initially filed for its construction permit specifying a single bay Shively 6812B antenna system. In an amendment that was denied, two bays were proposed ... When it came time to order the antenna, a 2-bay antenna was ordered ... Sumarrase’s consulting engineer was not aware of the actual order and substitution, and the Shively 6812B-1 was inadvertently specified with its corresponding TPO on the forthcoming license application ... Recently in an attempt to mitigate interference and upon learning that the information regarding the substitute antenna was not communicated properly in its license application, Sumarrase has attempted to conform as closely as possible to the single bay requested on the license application ...”³³

It is, therefore, undisputed that Sumarrase has operated WSGD-LP with an unauthorized two-bay antenna, instead of the single-bay antenna specified on the WSGD-LP license, and apparently violated section 73.845 of the Commission’s rules.³⁴ The Commission must rely on licensees for the accuracy of the information provided in license applications and reflected in station licenses. Sumarrase’s failure to specify the correct antenna in its license application has resulted in it operating at a variance from its licensed parameters and, potentially, to the alleged interference between WSGD-LP and W239CL.³⁵ Sumarrase’s violation precludes us from acting on its interference complaint. The responsibility for correcting the antenna error and accepting the consequences lies with Sumarrase. In a separate action we are issuing a Notice of Apparent Liability for Forfeiture to Sumarrase for apparently violating section 73.845 of the Commission’s rules by operating with an unauthorized antenna. We also mandate that Sumarrase either promptly return WSGD-LP to its licensed parameters or file an application for a minor modification of its station license to correct the violation³⁶ and reflect the manner in which it has been operating.³⁷

³⁰ *Id.* at Technical Exhibit, prepared by W. Jeffrey Reynolds, du Treil, Lundin & Rackley, Inc.

³¹ Reply at 3.

³² *Id.* at 3-5.

³³ Reply at 4. Sumarrase argues that “importantly, WSGD-LP has always operated with 22W ERP from its authorized height. Only during the brief periods suspiciously corresponding to the unauthorized site access by FMBC ... was WSGD-LP ever over power.” *Id.* at 5.

³⁴ See 47 CFR §73.845 (“Each LPFM licensee is responsible for maintaining and operating its broadcast station in a manner that complies with the technical rules set forth elsewhere in this part and in accordance with the terms of the station authorization...”).

³⁵ We emphasize not only the importance of building and operating a station consistent with the terms of the authorization, but also the importance of reviewing and ensuring the accuracy of the information contained in the license application and subsequent authorization.

³⁶ See, e.g., *Zwerling Broadcasting System*, Forfeiture Order, DA 22-1238 (2022) (ordering station operating with non-conforming operations to either return to its licensed parameters or file to modify its station authorization).

³⁷ If WSGD-LP still receives interference from W239CL, after correcting the violation and operating within its approved and licensed parameters, it is not precluded from filing another interference complaint. Any such complaint must include all necessary requirements as specified in sections 74.1201(k) and 74.1203(a)(3) of the rules. 47 CFR §§ 74.1201(k) and 74.1203(a).

Conclusion/Actions. Accordingly, IT IS ORDERED that the Petition for Reconsideration, filed October 6, 2020, by Sumarrase, Inc., IS DISMISSED.

Sincerely,

Albert Shuldiner
Chief, Audio Division
Media Bureau