



Federal Communications Commission
Washington, D.C. 20554

March 8, 2024

DA 24-227

In Reply Refer to:

1800B3-ARR

Released: March 8, 2024

Blueberry Radio
c/o William Spry
5114 Princeton Glendale Road
Liberty Twp, OH 45011
bspry@raduga.net

Re: **Blueberry Radio**
New LPFM, Liberty Township, Ohio
Facility ID No. 785490
Application File No. 0000231962

Petition for Reconsideration

Dear Applicant:

We have before us the Petition for Reconsideration (Petition)¹ filed by Blueberry Radio (Petitioner), seeking reconsideration of the Media Bureau's (Bureau) dismissal of Petitioner's application (Application) for a construction permit for a new low power FM (LPFM) station at Liberty Township, Ohio.² For the reasons set forth below, we deny the Petition.

Background. Petitioner filed the Application during the 2023 LPFM Filing Window,³ and certified that "the proposed facility complies with the engineering requirements of 47 CFR [s]ection 73.807(a) through (g), and 73.825" and did not request a waiver of that rule.⁴ On January 19, 2024, Bureau staff dismissed the Application for failure to meet the minimum distance spacing requirements enumerated in section 73.807(a)⁵ of the Commission's rules (Rules), with respect to the second-adjacent channel licenses of stations WNKN(FM), Middletown, Ohio and WUBE(FM), Cincinnati, Ohio, and noted that an amendment was not permitted under section 73.870(c) of the Rules.⁶

On January 29, 2024, Petitioner filed the Petition, seeking reinstatement of the Application and a waiver of section 73.870(c) in order to file a second-adjacent waiver exhibit. Specifically, Petitioner: 1)

¹ Pleading File No. 0000237337 (filed Jan. 29, 2024).

² Application File No. 0000231962 (filed Dec. 07, 2023).

³ *Media Bureau Announces Filing Procedures and Requirements for November 1 – November 8, 2023, Low Power FM Filing Window*, Public Notice, DA 23-642 (MB July 31, 2023) (*Procedures Public Notice*). Based on a request from LPFM advocates, the Bureau subsequently delayed the window until December 6, 2023. *Media Bureau Announces Revised Dates for LPFM New Station Application Filing Window*, Public Notice, DA 23-984 (MB Oct. 17, 2023). The Bureau subsequently extended the close of the window until December 15, 2023. *Media Bureau Announces Extension of LPFM New Station Application Filing Window*, Public Notice, DA 23-1150 (MB Dec. 11, 2023).

⁴ Application at Technical Certifications, Interference.

⁵ See 47 CFR § 73.807(a).

⁶ See *Broadcast Actions*, Public Notice, Report No. PN-2-240123-01 (MB Jan. 23, 2024) (citing 47 CFR § 73.870(c)). See also Application File Nos. 0000084313 and (BLH-20170320AAM) (license applications for WNKN(FM) and WUBE(FM)).

characterizes its failure to address the second channel spacing error, without request for a waiver, as a “simple error” on the part of its consulting engineer; 2) argues that a minor amendment could correct the error and warrant reinstatement of the Application *nunc pro tunc*; 3) notes that the Application is a singleton, and 4) requests waiver of section 73.870(c), in order to amend the Application to include a section 73.807 waiver, and submits a corresponding engineering data exhibit.⁷

Discussion. The Commission will consider a petition for reconsideration only when the petitioner shows either a material error in the Commission’s original determination, or raises additional facts not known or existing at the time of the petitioner’s last opportunity to present such matters.⁸ Petitioner has not demonstrated any legal error in the Bureau’s dismissal of the Application, nor has it cited any precedent that warrants reinstatement.

Section 73.807 Violation. Bureau staff correctly dismissed the Application for failure to meet second-adjacent channel spacing requirements, as outlined in section 73.807(a). Specifically, LPFM applicants must protect authorized FM stations, pending applications for new and existing FM stations filed prior to the release of the *Procedures Public Notice*, authorized LPFM stations, and vacant FM allotments, by meeting the minimum distance separation requirements specified in section 73.807 of the Commission’s rules.⁹ Pursuant to section 73.870(c), any application submitted during an LPFM filing window that fails to meet the spacing requirements of section 73.807 will be dismissed without opportunity to amend.¹⁰ Moreover, the *Procedures Public Notice* warned LPFM applicants that, “[c]onsistent with established processing rules, an LPFM application that fails to protect these authorizations, applications, and vacant FM allotments will be *dismissed with no opportunity to correct the deficiency*.”¹¹

Additionally, although section 3(b)(2)(A) of the Local Community Radio Act of 2010 (LCRA) authorizes the Commission to waive second-adjacent channel spacing requirements, an LPFM applicant must specifically request the waiver and demonstrate that its proposed LPFM facilities “will not result in interference to any authorized radio service.”¹² The Bureau explicitly cautioned LPFM applicants that it will dismiss any application that fails to comply with the second-adjacent channel spacing requirements without requesting a waiver, supported by the requisite engineering exhibit, and that a dismissed applicant will *not* be permitted to seek *nunc pro tunc* reinstatement of its application.¹³

Here, the Bureau correctly dismissed the Application because Petitioner failed to meet the minimum spacing requirements of section 73.807(a)(1) with respect to second-adjacent stations WNKN(FM) and WUBE(FM), and failed to submit a waiver request and supporting exhibit. The Commission has previously held that the Bureau may properly prohibit dismissed LPFM applicants that

⁷ Petition at 1.

⁸ See 47 CFR § 1.106(c), (d); see also *WWIZ, Inc.*, Memorandum Opinion and Order, 37 FCC 685, 686 (1964).

⁹ See 47 CFR § 73.807(a)(1).

¹⁰ See 47 CFR § 73.870(c).

¹¹ See *Procedures Public Notice* at 3 and n.14 (emphasis in original) (citing *Low Power FM Filing Window*, Public Notice, 15 FCC Rcd 24817, 24818 (MB 2000); *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, 8855 (MB 2013); 47 CFR § 73.870(c)).

¹² Pub. L. No. 111-371, 124 Stat. 4072 (2011); see also 47 CFR § 73.807(e) (outlining LPFM applicant requirements for a second-adjacent channel spacing waiver).

¹³ See *Procedures Public Notice* at 4; see also *Clifford Brown Jazz Foundation*, Memorandum Opinion and Order, 29 FCC Rcd 13258 (2014) (*Clifford Brown*) (affirming dismissal of application, without ability to amend and seek reinstatement, where applicant failed to comply with second-adjacent spacing rules and failed to include a waiver request with its application) (citing 47 CFR § 73.870(c)).

did not submit waiver requests of the second-adjacent channel spacing rules in the filing window from filing amendments to correct violations of section 73.807.¹⁴ Petitioner has not demonstrated any basis to contravene the rules and established precedent and reinstate the Application.

Section 73.870(c) Waiver Request. We reject Petitioner’s request of a waiver of section 73.870(c) to allow it to amend the Application to include a waiver of the section 73.807(a) second-adjacent channel spacing rule. The Commission’s Rules may be waived only for good cause shown.¹⁵ The Commission must give waiver requests “a hard look,” but an applicant for waiver “faces a high hurdle even at the starting gate”¹⁶ and must support its waiver request with a compelling showing.¹⁷ Waiver is appropriate only if both (1) special circumstances warrant a deviation from the general rule, and (2) such deviation better serves the public interest.¹⁸

Petitioner fails to meet this burden. Petitioner states generally that a waiver “serves the public interest,”¹⁹ but offers no other justification, circumstance, or precedent warranting grant of the request. Petitioner likewise fails to assert a “special circumstance” warranting the waiver beyond the error of its engineer. The Commission, however, has long held that errors of technical assistants are not an excuse for failure to adhere to the Rules.²⁰ Additionally, the Commission has held that a singleton is not a special circumstance that justifies a waiver of the Rules.²¹ Moreover, permitting applicants to file requests to waive section 73.807 minimum distance separation requirements after the close of the filing window and the Commission’s dismissal of their application for lack of such a waiver request would frustrate the processing efficiencies which sections 73.807 and 73.870(c) were designed to promote, be unfair to the many applicants who fully complied with the rules and filing requirements, and is therefore, contrary to the public interest.²² Accordingly, we find Petitioner fails to show that special circumstances warrant a deviation from our rules or that such deviation would serve the public interest.

¹⁴ See *Christian Charities Deliverance Church*, Memorandum Opinion and Order, 30 FCC Rcd 10548, 10549, para. 5 (2015) (finding *nunc pro tunc* reinstatement inapplicable because it is superseded by section 73.870(c)) (citing *People of Progress*, Memorandum Opinion and Order, 29 FCC Rcd 15065 (2014); *Clifford Brown*, 29 FCC Rcd 13258).

¹⁵ 47 CFR § 1.3.

¹⁶ *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969) (subsequent history omitted).

¹⁷ *Greater Media Radio Co., Inc.*, Memorandum Opinion and Order, 15 FCC Rcd 7090 (1999) (citing *Stoner Broadcasting System, Inc.*, Memorandum Opinion and Order, 49 FCC 2d 1011, 1012 (1974)).

¹⁸ *NetworkIP, LLC v. FCC*, 548 F.3d 116, 125-128 (D.C. Cir. 2008); *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990).

¹⁹ Petition at 1.

²⁰ See *Roy E. Henderson*, Memorandum Opinion and Order, 33 FCC 3385, 3387-88, para. 6 (2018) (rejecting argument that licensee’s engineer was to blame for station’s unauthorized operations); *Whidbey Island Ctr. for the Arts*, Forfeiture Order, 25 FCC Rcd 8204, 8205, para. 6 and n.12 (MB 2010) (“the Commission has long held that ‘licensees are responsible for the acts and omissions of their employees and independent contractors’”); *Vista Services Corporation*, Forfeiture Order, 15 FCC Rcd 20646, 20650 para. 9, n.24 (2000) (“[e]mployers are routinely held liable for breach of statutory duties, even where the failings are those of an independent contractor”).

²¹ See *NCE MX Group 543*, Memorandum Opinion and Order, 31 FCC Rcd 1358, 1360-61, para. 6 (2016).

²² See *Creation of a Low Power Radio Service*, Report and Order, 15 FCC Rcd 2205, 2257 (2000) (“In accordance with our window filing procedure for commercial broadcast applications, after the LPFM window closes, the staff initially will screen applications for the purpose of identifying those that are mutually exclusive and those that fail to protect existing broadcast stations in accordance with the standards adopted herein. Applications that fail to properly protect these existing stations will be dismissed without the applicant being afforded an opportunity to amend. This will increase the speed and efficiency with which LPFM applications can be processed by the staff.”).

Conclusion. For the reasons set forth above, **IT IS ORDERED** that the Petition for Reconsideration filed by Blueberry Radio, on January 29, 2024 (Pleading File No. 0000237337), IS DENIED.

Sincerely,

Albert Shuldiner
Chief, Audio Division
Media Bureau