



Federal Communications Commission  
Washington, D.C. 20554

March 11, 2024

**DA 24-230**

*In Reply Refer to:*

1800B3-ARR

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Unity Media and Radio  
c/o Jim Turvaville  
360 Patton Street - PO Box 144  
Mobeetie, TX 79061  
[jimturbo61@gmail.com](mailto:jimturbo61@gmail.com)

Re: **Unity Media and Radio**  
New LPFM, Athens, Tennessee  
Facility ID No. 785062  
Application File No. 0000231468

**Petition for Reconsideration**

Dear Applicant:

We have before us the Petition for Reconsideration (Petition)<sup>1</sup> filed by Unity Media and 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 Athens, Tennessee.<sup>2</sup> For the reasons set forth below, we deny the Petition.

**Background.** Petitioner filed the Application during the 2023 LPFM Filing Window,<sup>3</sup> and certified that "the proposed facility complies with the engineering requirements of 47 CFR [s]ection 73.807(a) through (g), and 73.825."<sup>4</sup> On January 17, 2024, Bureau staff dismissed the Application for failure to meet the minimum distance spacing requirements enumerated in section 73.807(a)<sup>5</sup> of the Commission's rules (Rules), with respect to the co-channel license of station WKVL(FM), Greenback, Tennessee, and noted that an amendment was not permitted under section 73.870(c) of the Rules.<sup>6</sup>

On February 1, 2024, Petitioner filed the Petition, seeking reinstatement of the Application and a waiver of section 73.870(c) in order to amend the Application to operate on Channel 297 instead of Channel 285. Specifically, Petitioner characterizes the co-channel spacing error as a "simple database

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<sup>1</sup> Pleading File No. 0000237208 (filed Jan. 29, 2024).

<sup>2</sup> Application File No. 0000231468 (filed Dec. 6, 2023).

<sup>3</sup> *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).

<sup>4</sup> Application at Technical Certifications, Interference.

<sup>5</sup> See 47 CFR § 73.807(a).

<sup>6</sup> See *Broadcast Actions*, Public Notice, Report No. PN-2-240119-01 (MB Jan. 19, 2024) (citing 47 CFR § 73.870(c)). See also Application File No. 0000221248 (license application for WKVL(FM)).

error” on the part of its consulting engineer, and argues that a minor amendment could correct the error to avoid mutual exclusivity, and warrants reinstatement of the Application *nunc pro tunc*.<sup>7</sup>

**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.<sup>8</sup> 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 the co-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.<sup>9</sup> 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.<sup>10</sup> 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*.”<sup>11</sup>

In addition, Section 3(b)(1) of the Local Community Radio Act of 2010 (LCRA) statutorily bars the Commission from “amend[ing] its rules to reduce the minimum co-channel and first-and second-adjacent channel distance separation requirements” in effect on the date of its enactment, and the Commission cannot waive the co-channel minimum distance spacing requirements imposed by statute.<sup>12</sup>

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 co-channel station WKVL(FM). The Commission has previously held that the Bureau may properly prohibit dismissed LPFM applicants that did not comply with the co-channel spacing rules in the filing window from filing amendments to correct violations of section 73.807.<sup>13</sup> Additionally, typographical error claims cannot be used to justify

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<sup>7</sup> Petition at 1.

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

<sup>9</sup> See 47 CFR § 73.807(a)(1).

<sup>10</sup> See 47 CFR § 73.870(c).

<sup>11</sup> 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)); see also *Christian Charities Deliverance Church*, Memorandum Opinion and Order, 30 FCC Rcd 10548, 10552-53, paras. 11-12 (2015) (*Christian Charities*) (affirming section 73.870(c) dismissal of applications for failure to meet minimum spacing requirements).

<sup>12</sup> Pub. L. No. 111-371, 124 Stat. 4072 (2011). See also *Rural Health Care Support Mechanism*, Order, 22 FCC Rcd 20360, 20415, para. 106 (2007) (“although the Commission has authority to waive regulatory requirements, it does not have authority to waive a requirement imposed by statute”); *Federal-State Joint Board on Universal Service*, Memorandum Opinion and Order, 15 FCC Rcd 7170, 7178, para. 13 (1999) (rejecting request to waive statute); see also *Chrysler Corp. v. Brown*, 441 U.S. 281, 302 (1979) (“[T]he exercise of quasi-legislative authority by governmental departments and agencies must be rooted in a grant of such power by the Congress and subject to the limitations which that body imposes.”).

<sup>13</sup> See *Calvary Chapel of Bremerton*, Letter Order, 28 FCC Rcd 15537, 15538-39 (MB 2013) (dismissing LPFM applications that fail to meet minimum co-channel spacing requirements, and noting that the Commission does not

filing an otherwise prohibited amendment.<sup>14</sup> 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 operate on Channel 297 instead of Channel 285. The Commission’s Rules may be waived only for good cause shown.<sup>15</sup> The Commission must give waiver requests “a hard look,” but an applicant for waiver “faces a high hurdle even at the starting gate”<sup>16</sup> and must support its waiver request with a compelling showing.<sup>17</sup> 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.<sup>18</sup>

Petitioner fails to meet this burden. Petitioner states generally that a waiver “serves the public interest,”<sup>19</sup> 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 made by engineering consultants are not an excuse for failure to adhere to the Rules.<sup>20</sup> Additionally, the Commission has held that the fact that an application is a singleton<sup>21</sup> is not a special circumstance that justifies a waiver of the Rules.<sup>22</sup> Moreover, permitting applicants to file application amendments to resolve section 73.807 minimum distance separation requirements after the close of the filing window and the Commission’s dismissal of their application 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.<sup>23</sup> Accordingly, we find Petitioner fails to

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have authority to waive co-channel spacing requirements); *see also Christian Charities* 30 FCC Rcd at 10552-53, paras. 11-12.

<sup>14</sup> *NCE MX Group 82*, Letter Order, DA 23-348 (MB Apr. 25, 2023) (rejecting argument to correct typographical error where corrective amendment was prohibited because it would result in increased mutually exclusivity and was a major amendment).

<sup>15</sup> 47 CFR § 1.3.

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

<sup>17</sup> *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)).

<sup>18</sup> *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).

<sup>19</sup> Petition at 1.

<sup>20</sup> *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”).

<sup>21</sup> An application which is not in conflict with any other application is deemed a singleton application.

<sup>22</sup> *See NCE MX Group 543*, Memorandum Opinion and Order, 31 FCC Rcd 1358, 1360-61, para. 6 (2016).

<sup>23</sup> *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.”).

show that special circumstances warrant a deviation from our rules or that such deviation would serve the public interest.

**Conclusion.** For the reasons set forth above, **IT IS ORDERED** that the Petition for Reconsideration filed by Unity Media and Radio, on January 29, 2024 (Pleading File No. 0000237208), IS DENIED.

Sincerely,

Albert Shuldiner  
Chief, Audio Division  
Media Bureau