



Federal Communications Commission  
Washington, D.C. 20554

April 22, 2024

**DA 24-373**

*In Reply Refer to:*

1800B3-ARR

Released: April 22, 2024

Tahoma Preservation  
c/o Tim Stone, President  
P.O. Box 111747  
Tacoma, WA 98411  
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Re: **Tahoma Preservation**  
New LPFM, Tacoma, Washington  
Facility ID No. 787979  
Application File No. 0000231404

**Petition for Reconsideration**

Dear Applicant:

We have before us a Petition for Reconsideration (Petition)<sup>1</sup> filed by Tahoma Preservation (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 Tacoma, Washington.<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> On January 19, 2024, Bureau staff dismissed the Application for failure to meet the minimum distance spacing requirements enumerated in section 73.807(a)<sup>4</sup> of the Commission's rules (Rules), with respect to the second-adjacent channel licenses of stations KQMV(FM), Bellevue, Washington, and KJR-FM, Seattle, Washington, and noted that an amendment was not permitted under section 73.870(c) of the Rules.<sup>5</sup>

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<sup>1</sup> Pleading File No. 0000238844 (filed Feb. 12, 2024).

<sup>2</sup> Application File No. 0000231404 (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> See 47 CFR § 73.807(a).

<sup>5</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 Nos. 0000120175 and BLH-20010206AAA (license applications for KQMV(FM) and KJR-FM). On January 4, 2024, Petitioner attempted to file an amendment to the Application. The Bureau denied this amendment on January 5, 2024, because it was impermissibly filed during a filing freeze on amendments to applications submitted in the 2023 LPFM Filing Window. See *Media Bureau Announces Close of LPFM New Station Filing Window and Temporary Filing Freeze on Amendments to Applications Submitted in the*

In the Petition, Petitioner seeks reinstatement of the Application and claims that, relying on FCC staff, it thought that the Commission's Licensing and Management System (LMS) would automatically take into account second-adjacent stations when determining the power of the proposed station and LMS would automatically adjust the proposed station's parameters based on those second-adjacent stations. Petitioner thus assumed no second-adjacent channel waiver request was needed.<sup>6</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>7</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 second-adjacent channel spacing requirements, as outlined in section 73.807(a).<sup>8</sup> 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>

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."<sup>12</sup> 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.<sup>13</sup>

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*December 2023 Filing Window*, Public Notice, DA 23-1165 (MB Dec. 15, 2023) (announcing filing freeze on amendments until January 31, 2024).

<sup>6</sup> Petition at 1.

<sup>7</sup> See 47 CFR § 1.106(c), (d); see also *WWIZ, Inc.*, Memorandum Opinion and Order, 37 FCC 685, 686 (1964).

<sup>8</sup> 47 CFR § 73.807.

<sup>9</sup> See *id.* § 73.807(a)(1).

<sup>10</sup> See *id.* § 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 47 CFR § 73.807(e) (outlining LPFM applicant requirements for a second-adjacent channel spacing waiver).

<sup>13</sup> 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

Here, the Bureau correctly dismissed the Application because Petitioner failed to meet the minimum distance spacing requirements of section 73.807(a)(1) with respect to second-adjacent channel stations KQMV(FM) and KJR(FM), and failed to submit a second-adjacent channel waiver request and supporting exhibit. The Commission has previously held that the Bureau may properly prohibit dismissed LPFM applicants that did not comply with the second-adjacent channel spacing rules in the filing window from filing amendments to correct violations of section 73.807.<sup>14</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 applications would frustrate the processing efficiencies which sections 73.807 and 73.870(c) were designed to promote and be unfair to the many applicants who fully complied with the rules and filing requirements. It is, therefore, contrary to the public interest.<sup>15</sup> Petitioner has not demonstrated any basis to contravene the rules and established precedent and reinstate the Application.

*Reliance on Staff Advice.* Finally, we reject Petitioner's claim that its failure to file the required request for a second-adjacent channel waiver is due to FCC staff advice. The Petition simply states, "IT WAS OUR UNDERSTANDING FROM THE FCC STAFF", but provides no names of FCC staff involved, no dates for conversations with FCC staff or copies of emails with FCC's staff. Thus, the Petition's claims of advice from FCC staff are not credible. Moreover, the Commission has consistently held that parties relying on staff advice do so at their own risk.<sup>16</sup> Applicants are required to comply with the Commission's rules and procedures, which were clearly outlined by the *Procedures Public Notice*.<sup>17</sup>

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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)).

<sup>14</sup> See *Christian Charities*, 30 FCC Rcd at 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).

<sup>15</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.").

<sup>16</sup> See, e.g., *Texas Media Group*, Memorandum Opinion and Order, 5 FCC Rcd 2851, 2852, para. 8 (1990) ("It is the obligation of interested parties to ascertain facts from official Commission records and files and not rely on statements or informal opinions by the staff."), *aff'd sub nom. Malkan FM Assocs. v. FCC*, 935 F.2d 1313 (D.C. Cir. 1991); *Hinton Telephone Company*, Memorandum Opinion and Order on Reconsideration, 10 FCC Rcd 11625, 11637, para. 42 (1995) ("The Commission has specifically held that parties who rely on staff advice or interpretations do so at their own risk.").

<sup>17</sup> See *Procedures Public Notice* at 3 (explaining that an application that fails to comply with the second-adjacent channel spacing requirements, without requesting a waiver, will be dismissed with no opportunity to amend); see also *Marketing Strategy Leaders, Inc.*, Forfeiture Order, 33 FCC Rcd 4663, 4674, para. 32 & n.79 (2018) ("[O]ne may not 'claim ignorance of the law as a defense'" (internal cites omitted); *PTT Phone Cards, Inc.*, Forfeiture Order, 30 FCC Rcd 14701, 14704, para. 10 (2015) ("PTT's purported ignorance of the law certainly does not excuse the fact that it . . . [was] out of compliance with all of the provisions of the Act and the [Commission's] [r]ules to which it was subject."); *Southern California Broadcasting Co.*, Memorandum Opinion and Order, 6 FCC Rcd 4387, para 3 (1991), *recon. denied*, 7 FCC Rcd 3454 (1992) (stating that "inadvertence . . . is at best, ignorance of the law, which the Commission does not consider a mitigating circumstance").

**Conclusion.** For the reasons set forth above, **IT IS ORDERED** that the Petition for Reconsideration filed by Tahoma Preservation, on February 12, 2024 (Pleading File No. 0000238844) **IS DENIED.**

Sincerely,

Albert Shuldiner  
Chief, Audio Division  
Media Bureau