



Federal Communications Commission
Washington, D.C. 20554

May 2, 2024

DA 24-414

In Reply Refer to:

1800B3-ARR

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Tacoma Hilltop Foundation
c/o Donald Brown
P.O. Box 111747
Tacoma, WA 98411
HilltopFoundation@outlook.com

Re: **Tacoma Hilltop Foundation**
New LPFM, Tacoma, Washington
Facility ID No. 788049
Application File No. 0000231685

Petition for Reconsideration

Dear Applicant:

We have before us a Petition for Reconsideration (Petition)¹ filed by Tacoma Hilltop Foundation (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.² For the reasons set forth below, we deny the Petition.

Background. Petitioner filed the Application during the 2023 LPFM Filing Window.³ On January 22, 2024, Bureau staff dismissed the Application for failure to meet the minimum distance spacing requirements enumerated in (1) section 73.807(a)⁴ of the Commission's rules (Rules), with respect to the second-adjacent channel license of station KNKX(FM), Tacoma, Washington, and (2) section 73.825⁵ of the Rules, with respect to low power TV Channel 6 station KYMU-LD, Seattle, Washington. The staff also noted that an amendment was not permitted under section 73.870(c) of the Rules.⁶

¹ Pleading File No. 0000239023 (filed Feb. 14, 2024).

² Application File No. 0000231685 (filed Dec. 6, 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 See 47 CFR § 73.807(a).

⁵ See 47 CFR § 73.825.

⁶ See *Broadcast Actions*, Public Notice, Report No. PN-2-240122-01 (MB Jan. 22, 2024) (citing 47 CFR § 73.870(c)). See also Application File Nos. BLED-20080715ADJ and 0000081648 (license applications for KNKX(FM) and KYMU-LD). On January 5, 2024, Petitioner attempted to file an amendment to the Application.

In the Petition, Petitioner seeks reinstatement of the Application and claims that it believed the Commission's Licensing and Management System automatically took into account second-adjacent channel stations and low power TV station licenses when determining the power of its proposed LPFM station and adjusted its proposed station's parameters based on any short-spacings. Petitioner thus assumed no second-adjacent channel waiver request or TV Channel 6 agreement was required.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 and 73.825 Violations. Bureau staff correctly dismissed the Application for failure to meet (1) the section 73.807(a)⁹ second-adjacent channel spacing requirements and (2) the section 73.825 channel spacing requirements with respect to low power TV stations authorized on Channel 6.¹⁰ 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.¹¹ LPFM applicants for Channels 201 to 220 must also protect and satisfy the minimum separation distances with respect to full power TV Channel 6 stations, and low power TV, TV translator, and Class A TV stations authorized on TV Channel 6, unless accompanied by a written agreement between the LPFM applicant and each affected TV Channel 6 station concurring with the proposed LPFM facilities.¹² 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.¹³ 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.*"¹⁴

The Bureau denied this amendment on January 8, 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 December 2023 Filing Window*, Public Notice, DA 23-1165 (MB Dec. 15, 2023) (announcing filing freeze on amendments until January 31, 2024).

⁷ Petition at 1. Although Petitioner refers to a waiver of section 73.825, as discussed below, applicants that do not meet the spacing requirements of section 73.825 may file an agreement with the affected TV Channel 6 station concurring with the proposed LPFM facilities.

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

⁹ 47 CFR § 73.807(a).

¹⁰ 47 CFR § 73.825.

¹¹ *See id.* § 73.807(a)(1).

¹² 47 CFR § 73.825(a).

¹³ *See id.* § 73.870(c).

¹⁴ *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).

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.”¹⁵ 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.¹⁶

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 station KNKX(FM), and failed to submit a second-adjacent channel waiver request and supporting exhibit. Petitioner also failed to meet the minimum distance spacing requirements of section 73.825 with respect to low power TV station KYMU-LD, and the Application lacked a written agreement with station KYMU-LD. 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 73.807.¹⁷ 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.¹⁸ Petitioner has not demonstrated any basis to contravene the rules and established precedent and reinstate the Application.

Failure to File Second-Adjacent Waiver and Channel 6 Agreement. Finally, we reject Petitioner’s claim that it was unaware it was required to file a request for a second-adjacent channel waiver or a TV Channel 6 agreement. Applicants are required to comply with the Commission’s rules and procedures, which were clearly outlined by the *Procedures Public Notice*.¹⁹

¹⁵ 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).

¹⁶ *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)).

¹⁷ *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).

¹⁸ *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.”).

¹⁹ *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, and requiring applications for Channels 201 to 220 to meet TV Channel 6 spacing requirements); *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

Conclusion. For the reasons set forth above, **IT IS ORDERED** that the Petition for Reconsideration filed by Tacoma Hilltop Foundation, on February 14, 2024 (Pleading File No. 0000239023) **IS DENIED**.

Sincerely,

Albert Shuldiner
Chief, Audio Division
Media Bureau

(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”).