



Federal Communications Commission
Washington, D.C. 20554

May 13, 2024

DA 24-452

In Reply Refer to:

1800B3-ARR

Released: May 13, 2024

City of Henrietta - Clay County - Texas
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Re: **City of Henrietta - Clay County - Texas**
New LPFM, Henrietta, Texas
Facility ID No. 782897
Application File No. 0000231417

Petition for Reconsideration

Dear Applicant:

We have before us a Petition for Reconsideration (Petition)¹ filed by City of Henrietta - Clay County - Texas (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 Henrietta, Texas.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 17, 2024, Bureau staff dismissed the Application for failure to meet the minimum distance spacing requirements enumerated in section 73.807(a)⁴ of the Commission's rules (Rules), with respect to the co-channel license of station KZMJ(FM), Gainesville, Texas. The staff also noted that an amendment was not permitted under section 73.870(c) of the Rules.⁵

In the Petition, Petitioner seeks reinstatement of the Application so it can change the proposed station's frequency either to 90.5 MHz, or a frequency of the Commission's choosing, in order to comply with the section 73.807 spacing requirements.⁶ Alternatively, Petitioner requests reinstatement to amend

¹ Pleading File No. 0000238624 (filed Feb. 9, 2024).

² Application File No. 0000231417 (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 *Broadcast Actions*, Public Notice, Report No. PN-2-240119-01 (MB Jan. 19, 2024) (citing 47 CFR § 73.870(c)) (*Dismissal Public Notice*). See also Application File No. BLH-20120809ABG (license application for KZMJ(FM)).

⁶ Petition at 2.

the Application to include a waiver of the co-channel minimum distance spacing requirements, because it claims the proposed new station will not result in actual interference to KZMJ(FM), since the new station would only be short-spaced by 1km under the required minimum distance.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 the co-channel spacing requirements, as outlined in section 73.807(a).⁹ 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.¹⁰ 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.¹¹ 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*.”¹²

The Bureau correctly dismissed the Application because the Application failed to meet the minimum distance spacing requirements of section 73.807(a)(1) with respect to co-channel station KZMJ(FM). As noted, 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 73.807.¹³

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

⁷ *Id.*

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 *Id.*

¹¹ See *id.* § 73.870(c).

¹² 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).

¹³ 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 have authority to waive co-channel spacing requirements); see also *Christian Charities*, 30 FCC Rcd at 10552-53, paras. 11-12.

rules and filing requirements. It is, therefore, contrary to the public interest.¹⁴ Petitioner has not demonstrated any basis to contravene the rules and established precedent and reinstate the Application.

Finally, we reject Petitioner's request to waive section 73.807(a) with regard to co-channel station KZMJ(FM). Section 3(b)(1) of the Local Community Radio Act of 2010 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.¹⁵

Conclusion. For the reasons set forth above, **IT IS ORDERED** that the Petition for Reconsideration filed by City of Henrietta - Clay County - Texas, on February 9, 2024 (Pleading File No. 0000238624) **IS DENIED**.

Sincerely,

Albert Shuldiner
Chief, Audio Division
Media Bureau

¹⁴ 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.").

¹⁵ 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.").