

**Before the
Federal Communications Commission
Washington, D.C. 20554**

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| In the Matter of |) | |
| |) | |
| Walker Broadcasting Company, Inc. |) | WFBT(DT), Bath New York |
| Application for License to Cover Construction |) | Fac. ID No. 72623 |
| Permit, Application for Construction Permit and |) | File Nos. BLCDDT-20090402AOD and |
| Petition for Eligible Entity Status |) | BPCDDT-20080319ADH |
| |) | |
| Application Procedures for Broadcast Incentive |) | AU Docket No. 14-252; GN Docket No. 12- |
| Auction Scheduled to Begin on March 29, 2016; |) | 268; WT Docket No. 12-269 |
| Technical Formulas for Competitive Bidding |) | |

MEMORANDUM OPINION AND ORDER

Adopted: March 18, 2016

Released: March 18, 2016

By the Commission: Commissioner Pai concurring and issuing a statement; Commissioner O’Rielly issuing a statement.

I. INTRODUCTION

1. The Commission has before it an Application for Review¹ (AFR) filed by Walker Broadcasting Company, Inc. (Walker or Permittee). Walker, the former permittee of Station WFBT(DT), Bath, New York (Station or WFBT), seeks review of a letter decision by the Chief of the Video Division (Division), Media Bureau (Bureau) denying and, in the alternative, dismissing Walker’s Petition for Eligible Entity Status for purposes of the broadcast television spectrum incentive auction.² The AFR also seeks review of the Division’s decision to dismiss the Station’s application for a license to cover a construction permit, delete the Station’s call sign, and find that the Station’s construction permit had expired and been automatically forfeited.³ Additionally, Walker has filed a Petition for Reconsideration (PFR) of the Wireless Telecommunications Bureau’s *Applications Procedures Public Notice*.⁴ Among other things, the PFR requests that the Station be deemed eligible for purposes of the incentive auction pending the outcome of the AFR. In this decision, we deny the AFR. We also dismiss and, alternatively, deny the PFR.

¹ Application for Review filed by Walker Broadcasting Company, Inc. (Sept. 30, 2015) (AFR).

² Letter from Barbara A. Kreisman, Chief, Video Division, Media Bureau to Walker Broadcasting Company, Inc. (Aug. 31, 2015), <https://enterpriseefiling.fcc.gov/dataentry/public/tv/publicFacilityDetails.html?facilityId=72623> (August 2015 Decision or Decision); Petition for Eligible Entity Status filed by Walker Broadcasting Company, Inc., File No. BLCDDT-20090402AOD (June 12, 2015) (Eligibility Petition).

³ AFR at 6-13.

⁴ See Petition for Reconsideration filed by Walker Broadcasting Company, Inc., AU Docket No. 14-252; GN Docket No. 12-268; WT Docket No. 12-269 (Nov. 30, 2015) (PFR); *Application Procedures for Broadcast Incentive Auction Scheduled to Begin on March 29, 2016*, Public Notice, AU Docket No. 14-252, GN Docket No. 12-268, WT Docket No. 12-269, 30 FCC Rcd 11034 (WTB, 2015) (*Application Procedures Public Notice*).

II. BACKGROUND

2. Walker was initially granted an analog construction permit on April 23, 2004, with an expiration date of April 23, 2007. On April 11, 2006, following the conclusion of a proceeding challenging the grant of the construction permit, the Division tolled expiration of the Station's construction permit until April 3, 2009.⁵ On March 25, 2008, upon the request of the Permittee, the Station's analog construction permit was converted to a digital construction permit with the existing April 3, 2009 expiration date.⁶

3. Under the Commission's rules, a permittee may begin operating a television station pursuant to program test authority once it completes construction in accordance with the terms of the construction permit, provided that an application for a license to cover the construction permit is filed within 10 days.⁷ Because the Station was authorized to operate on channel 14, however, its construction permit included a condition requiring the Permittee to submit a request for program test authority together with "documentation that objectionable interference will not be caused to existing land mobile radio [LMR] facilities," and prohibiting the Permittee from commencing program tests until program test authority was granted (hereinafter referred to as LMR Condition).⁸

4. On April 2, 2009, the Permittee filed an application for license to cover its digital construction permit.⁹ As part of its license application, the Permittee certified to compliance with all conditions in the construction permit.¹⁰ Despite the certification, however, the Permittee had not submitted a request for program test authority or the documentation required by the LMR Condition. Accordingly, the license application was not granted. WFBT has never commenced operation.

5. On February 22, 2012, the Middle Class Tax Relief and Job Creation Act of 2012 (Spectrum Act) was enacted.¹¹ Among other things, Congress required the Commission in the repacking process to make all reasonable efforts to preserve, as of February 22, 2012, the coverage area and population served of an eligible licensee that does not voluntarily relinquish its spectrum usage rights.¹²

⁵ 47 CFR § 73.3598(b)(2); Letter from Barbara A Kreisman, Chief, Video Division, Media Bureau to William H. Walker III (Apr. 11, 2006); Letter from A. Wray Fitch III, Gammon and Grange, P.C. to Marlene H. Dortch, Secretary, Federal Communications Commission (filed Oct. 11, 2006) (noting that tolling of the construction permit for 712 days would result in a construction permit expiration date of April 3, 2009).

⁶ File No. BPCDT-20080319ADH. The licensee filed and was granted a minor modification to its digital construction permit. File No. BMPCDT-20090327AEF.

⁷ 47 CFR § 73.1620(a)(1). Permittees operating under program test authority must operate "in strict compliance with the rules governing broadcast stations," which include a minimum operating schedule. 47 CFR §§ 73.1620(d), 73.1740(a)(2).

⁸ Construction Permit for Station WFBT Bath, NY, File No. BMPCDT-20090327AEF (granted Mar. 30, 2009), (WFBT Construction Permit). *See* 47 CFR § 73.687(e)(4)(ii) ("A TV permittee [on channel 14] must take steps before construction to identify potential interference to normal land mobile operation that could be caused by TV emissions outside the authorized channel, land mobile receiver desensitization or intermodulation. It must install filters and take other precautions as necessary and submit evidence that no interference is being caused before it will be permitted to transit programming on the new facilities...").

⁹ FCC File No. BLCDDT 20090402AOD ("WFBT License Application").

¹⁰ WFBT License Application, Section III, Question 6 ("Special Operating Conditions. The facility was constructed in compliance with all special operating conditions, terms, and obligations described in the construction permit.") (as originally filed).

¹¹ Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. No. 112-96, §§ 6402 (codified at 47 U.S.C. § 309(j)(8)(G)), 6403 (codified at 47 U.S.C. § 1452), 126 Stat. 156 (2012).

¹² *See* 47 U.S.C. § 1452(b)(2). Through the repacking process, the Commission will reorganize the television bands to make spectrum available to carry out a forward auction of new, flexible-use licenses suitable for providing mobile
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In the *Incentive Auction R&O*,¹³ the Commission concluded that the “all reasonable efforts” mandate applies to the coverage area and population served of full power and Class A television facilities licensed or for which an application for a license to cover was on file as of February 22, 2012.¹⁴ The Commission also determined that the Spectrum Act provided it with the discretionary authority to extend protection to additional facilities, and used this authority to extend protection in a limited number of circumstances.¹⁵ Facilities eligible for discretionary protection were required to be licensed by the Pre-Auction Licensing Deadline,¹⁶ which the Bureau designated as May 29, 2015.¹⁷

6. On May 28, 2015, one day before the Pre-Auction Licensing Deadline and over six years after filing its license application, the Permittee filed an amendment to its license application providing documentation intending to demonstrate non-interference with LMR operations.¹⁸ On June 9, 2015, the Bureau issued a Public Notice (*Eligibility Public Notice*) listing each station facility eligible for protection in the repacking process and for relinquishment in the incentive auction (*i.e.*, “eligible facility”).¹⁹ WFBT was not listed as an eligible facility. On June 12, 2015, the Permittee filed a Petition for Eligible Entity Status (Eligibility Petition), requesting that WFBT be deemed an eligible facility for purposes of the incentive auction.²⁰

7. On August 31, 2015, the Division issued the decision at issue.²¹ The Division found that the Station’s construction permit had expired and been automatically forfeited as of April 3, 2009.²² Based on this finding, the Division denied Walker’s request to be designated an eligible facility,

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broadband services.

¹³ *Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, GN Docket No. 12-268, Report and Order, 29 FCC Rcd 6567 (2014), *aff’d*, *Nat’l Assoc. of Broadcasters, et al. v. FCC*, 789 F.3d 165 (D.C. Cir. 2015) (*Incentive Auction R&O*).

¹⁴ See 47 U.S.C. § 1452(b)(2); *Incentive Auction R&O*, 29 FCC Rcd at 6652-54, paras. 185-89. Although WFBT had an application for a license to cover on file as of February 22, 2012, *see supra*, para. 4, it was not entitled to mandatory protection because it was never authorized to commence operations as of that date. *See id.* at para. 3; *Incentive Auction R&O*, 29 FCC Rcd at 6652-53, para. 186 (in extending mandatory protection to stations with a license to cover on file as of February 22, 2012, reasoning that “it is reasonable to assume the facility was in operation as of that date if an application for a license to cover was on file” because under the Commission’s rules, “the filing of a license to cover application ... provides the applicant with the right to provide a broadcast television service to the public.”). Walker never had such a right because of its failure to comply with the LMR Condition in its construction permit, which was a condition precedent to the Station providing service. We note that Walker does not contend that WFBT is entitled to mandatory protection.

¹⁵ *Incentive Auction R&O*, 29 FCC Rcd at 6655-63, paras. 194-218.

¹⁶ *See id.* at 6656, para. 195.

¹⁷ *Media Bureau Designates May 29, 2015 as Pre-Auction Licensing Deadline*, Public Notice, 30 FCC Rcd 393 (MB 2015); *see also Media Bureau Reminds Full Power and Class A Licensees of the Approaching May 29, 2015 Pre-Auction Licensing Deadline*, Public Notice 30 FCC Rcd 4766 (MB 2015).

¹⁸ WFBT License Application at Attachments (as amended May 28, 2015).

¹⁹ *Media Bureau Announces Incentive Auction Eligible Facilities and July 9, 2015 Deadline for Filing Pre-Auction Technical Certification Form*, Public Notice, 30 FCC Rcd 6153 (rel. Jun. 9, 2015) (*Eligibility Public Notice*).

²⁰ The Bureau established a July 9, 2015 deadline for filing such petitions “if a licensee believes that the Appendix omits an eligible facility,” and required that the petitioner “explain the reason it believes the facility is eligible consistent with the *Incentive Auction R&O* (e.g., the facility was subject to mandatory or discretionary protection).” *Eligibility Public Notice*, 30 FCC Rcd at 6154.

²¹ August 2015 Decision.

²² *Id.* at 3-4.

reasoning that there was no underlying authorization or facility to protect in the repacking process or licensed spectrum usage rights to relinquish in the reverse auction.²³ The Division also dismissed the Station's license application as patently defective for failing to include the necessary documentation to demonstrate compliance with the LMR Condition and for failing to provide information requested by staff.²⁴ Alternatively and independently, the Division dismissed the Eligibility Petition on the procedural ground that it was effectively a late-filed petition for reconsideration of the *Incentive Auction R&O*, and denied it on the substantive ground that the Station does not qualify for discretionary protection under the *Incentive Auction R&O*.²⁵

8. On September 30, 2015, Walker filed its AFR seeking reinstatement of the license application, construction permit, and call sign. Walker argues that dismissal of the license application was contrary to Commission rules and policy, and that the Commission should reinstate and grant the license application.²⁶ Walker also contends that equity warrants reversal of the Division's decision.²⁷ In this regard, Walker argues that its license application was pending for several years during which time the Division, rather than dismissing the license application and deeming the construction permit forfeited, requested that Walker file the required LMR documentation,²⁸ and Walker claims that it paid regulatory fees and incurred expenses relating to the station.²⁹ The AFR also requests reconsideration of the Division's decision dismissing and, in the alternative, denying Walker's Eligibility Petition, contending that the Commission decided to protect WFBT in the *Incentive Auction R&O* when it extended discretionary protection to new full power television stations that were authorized by construction permits, but not yet licensed, as of February 22, 2012.³⁰

9. On October 15, 2015, the Wireless Telecommunications Bureau released the *Application Procedures Public Notice*, which established the final application procedures for the reverse and forward auctions, provided detailed information related to the application process, and finalized certain post-auction procedures.³¹ In its timely filed PFR,³² Walker requests that the Commission find that WFBT is eligible to participate in the reverse auction until action on its AFR is final, relying on the Commission's decision in the *Incentive Auction R&O* to permit any licensed full power or Class A station that is subject to a non-final license validity proceeding to maintain its auction eligibility until such action is final.³³

²³ *Id.* at 4.

²⁴ *Id.* at 3, citing 47 CFR §§ 73.3566(a), 73.3566(b), and 73.3568(a)(1).

²⁵ *Id.* at 4-6.

²⁶ AFR at 3-4, 6-12.

²⁷ *Id.* 12-13, 16.

²⁸ *Id.* at 8, 13.

²⁹ *Id.* at 13, 16.

³⁰ *Id.* at 14-15.

³¹ *Applications Procedures Public Notice*, 30 FCC Rcd 11034.

³² Petitions for Reconsideration of the Applications Procedures Public Notice were required to be filed by November 30, 2015. Deadline Established for Petitions for Reconsideration of the Auction 1000 Application Procedures Public Notice, Public Notice AU Docket No. 14-252, GN Docket No. 12-268, WT Docket No. 12-269, 30 FCC Rcd 11681 (2015); see Application Procedures Public Notice, 80 FR 66429 (Oct. 29, 2015). Pursuant to section 1.429(d), parties have thirty days from the date of public notice, which, as defined by section 1.4(b), is the date of publication in the Federal Register, to file a petition for reconsideration. 47 CFR §§ 1.4(b)(1), 1.429(d).

³³ PFR at 3; see *Incentive Auction R&O*, 29 FCC Rcd at 6722-23, paras. 362-64.

III. DISCUSSION

A. License Application and Underlying Construction Permit

10. We affirm the August 2015 Decision that Walker's construction permit was automatically forfeited pursuant to Section 319(b) of the Communications Act, as amended, and section 73.3598(e) of the Rules.³⁴ We also affirm the Bureau's dismissal of the license application as there was no longer a valid authorization to license at the time of the August 2015 Decision.³⁵

11. Section 319(b) provides that a construction permit "will be automatically forfeited if the station is not ready for operation within the time specified."³⁶ Under the Commission's rules, "[a]ny construction permit for which construction has not been completed and for which an application for license has not been filed, shall be automatically forfeited upon expiration without any further affirmative cancellation by the Commission."³⁷ Walker's construction permit expressly conditioned the commencement of program tests for WFBT on submission of "documentation that objectionable interference will not be caused to existing land mobile radio facilities."³⁸ Because Walker failed to satisfy this condition by submitting the required documentation by the expiration date of its construction permit, Walker's facility was not "ready for operation" as of that date within the meaning of Section 319(b). Furthermore, construction of Walker's facility was not completed by the expiration date because the Station was not "buil[t] in accordance with all terms of [its] construction permit" by that date.³⁹ Walker's filing of an incomplete license application did not prevent or suspend the expiration of its construction permit,⁴⁰ nor did its inaccurate certification as to compliance with the LMR Condition.⁴¹

³⁴ An Application for Review must establish that Bureau actions either: (i) conflicted with statute, regulation, case precedent or Commission policy; (ii) involved a question of law or policy not previously resolved by the Commission; (iii) involved precedent or policy that should be overturned or revised; (iv) made an erroneous finding as to an important fact; or (v) made a prejudicial procedural error. See 47 CFR § 1.115(b)(2).

³⁵ Walker does not dispute that it failed to provide the required LMR interference study upon filing its license application, nor does it challenge in the AFR the Division's finding that the construction permit was automatically forfeited upon expiration. In light of these facts and the reasons set forth in our decision, we need not reach a conclusion as to Walker's arguments concerning the dismissal of the license application as patently defective and for failing to provide information requested by the staff. See AFR at 6-12 (challenging the Division's dismissal of the license application pursuant to sections 73.3566(a), 73.3566(b), and 73.3568(a)(1)). These arguments are irrelevant to our ultimate determination that the construction permit expired and was forfeited as a matter of law. See *supra* n. 40, 42, 45.

³⁶ 47 U.S.C. § 319(b).

³⁷ See 47 CFR § 73.3598(e).

³⁸ WFBT Construction Permit ("Documentation that objectionable interference will not be caused to existing land mobile radio facilities shall be submitted along with the request for Program Test Authority. Program tests shall not be commenced under Section 73.1620(a) of the Commission's rules and may only be started after specific authority is granted by the Commission.")

³⁹ *Tango Radio, LLC*, Memorandum Opinion and Order, 30 FCC Rcd 10564, 10567, para. 6 (2015) ("broadcast permittees must, by the construction deadline specified in each construction permit: (1) build in accordance with all terms of the construction permit, and (2) file a license application demonstrating proper construction.") ("*Tango*"). See also *Aerco Broadcasting Corp.*, Memorandum Opinion and Order, 18 FCC Rcd 24417, 24419-20 (2003) ("*Aerco*") (explaining that "patent omissions in the technically critical proofs of performance" do not allow the staff to "determine whether the terms and conditions of the construction permit have been satisfied and whether the constructed facilities will operate in conformance with the Commission's rules").

⁴⁰ *Tango*, 30 FCC Rcd at 10567, para. 6 ("Parties cannot file defective license applications as mere placeholders." (citing *Aerco*, 18 FCC Rcd at 24419-20, para. 7 (2003)); *Pathfinder Communications Corp.*, Memorandum Opinion and Order, 18 FCC Rcd 9272, 9279, para. 13 (2003) ("Implicit in the filing of any facility application is that the applicant stands 'ready, willing, and able' to construct and operate as proposed"); Letter from Barbara A. Kreisman, Chief, Video Division, to The Atlanta Channel, Inc., 1800E3-JLB (Vid. Div. 2000), *app. rev. denied*, 27 FCC Rcd

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Walker did not even attempt to file a formal amendment to provide the LMR interference study until nearly six years after the construction permit expired. Walker's attempt to use the corrective amendment process to extend its construction deadline six years later was inappropriate and inconsistent with the Commission's goals of prompt initiation of service and spectrum efficiency.⁴² Accordingly, Walker's construction permit expired on April 3, 2009 and, pursuant to Section 319(b) and the Rules, was automatically forfeited.⁴³ Because the underlying construction permit was automatically forfeited, the Bureau properly dismissed the Station's license application in the August 2015 Decision.

12. We disagree with Walker's contention that equity warrants grant of the license application.⁴⁴ The lapse of time between the expiration of the construction permit and the Division's letter decision dismissing the license application does not change the fact that a construction permit is automatically forfeited by operation of law and regulation "without any further affirmative cancellation by the Commission."⁴⁵ Formal dismissal of the license application in 2015 was simply a response to Walker's belated efforts to revive a long-expired permit. Here, automatic cancellation followed from Walker's failure to timely comply with the unambiguous LMR Condition or to timely seek a waiver of the LMR Condition or an extension of the construction period.⁴⁶ Walker alone is responsible for his lack

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14541 (2012), *recon. dismissed or denied*, 29 FCC Rcd 11848 (MB 2014) (dismissal of an initial and late-filed corrected application was proper as the initial application lacked the required certifications and exhibits).

⁴¹ See *supra*, para. 4; *Timothy C. Cutforth*, Memorandum Opinion and Order, 29 FCC Rcd 13066 (2014) (upholding expiration of construction permit where license application was incomplete due to inaccurate certification as to whether all permit conditions were satisfied). While Walker contends that it e-mailed documentation to Division staff to satisfy the LMR Condition, AFR at 5 and Exhibits 4, 5, such information was neither timely nor properly filed. To the extent Walker "hoped" further documentation was unnecessary and sought to rely on engineering statements filed in connection with its July 2000 and March 2009 construction permit applications, see File Nos. BPCT-19870331LW and BMPCDT-20090327AEF, it should have explained this in its license application or sought a waiver of the LMR Condition, but it did not. See AFR at 5 and Exhibits 4, 5. In any event, the LMR Condition, as well as section 73.687(e)(4)(ii) of the Rules, require a demonstration that objectionable interference will not be caused to "existing" LMR facilities. 47 CFR § 73.687(e)(4)(ii). Not only did the March 2009 engineering statement fail to contain any analysis demonstrating that LMR interference would not be caused, but Walker's contention that the Commission should rely on a nine-year-old engineering statement to demonstrate a lack of interference to "existing" facilities is implausible on its face. See AFR at Exhibits 4, 5.

⁴² See 47 CFR § 73.3598(a) and (b) (establishing time periods for construction and circumstances for requesting tolling); *Streamlining of Mass Media Applications, Rules, and Processes*, Memorandum Opinion and Order, 14 FCC Rcd 17525, 17539, para. 35 (1999) (construction deadlines are necessary to minimize spectrum warehousing by those who do not have the intent or foresight to ensure the prompt conclusion of construction and initiation of service) ("*Streamlining Order*"). Where a permittee has not timely constructed or met a permit condition, it must ask for and justify more time, demonstrating that the failure was the result of a limited number of types of specified causes not under the control of the permittee. 47 CFR § 73.3598(b),(c),(d); *Streamlining Order*, 14 FCC Rcd at 17539-41, paras 35-42.

⁴³ See 47 U.S.C. § 319(b); 47 CFR § 73.3598(e). Walker cites two instances in which the Division granted a license despite the failure to file required LMR documentation until after expiration of the construction permit. See AFR at 7-8 (citing WFTV-TV Holdings, Inc., 18 FCC Rcd 20056 (MB, 2003) (regarding Station WRDQ(TV), Orlando, FL) and File No. BLCDDT-20090622AFO (regarding Station KOCW(TV), Hoisington, Kansas). As the Division has not been afforded the opportunity to pass upon this argument, we dismiss it. We note, however, that the cases Walker cites are factually distinguishable: the stations in those cases were already providing licensed analog service when they filed their applications for licenses to operate on digital channel 14, whereas Walker's facility never provided broadcast service before its permit expired.

⁴⁴ See AFR at 8-9, 12-13, 16.

⁴⁵ See 47 U.S.C. § 319(b); 47 CFR § 73.3598(e).

⁴⁶ Walker contends that it provided the missing LMR documentation in e-mails sent to Division staff in July 2010 and August 2010, in response to staff requests for this information in June 2010. AFR at 4-6 and Exhibits 4, 5. See

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of diligence, and its corresponding consequences. WFBT has never provided broadcast television service. It is Walker's lack of diligence in complying with the LMR Condition that has resulted in viewers being deprived of local television service, an equitable consideration weighing decidedly against grant of the license application.

B. Eligibility Petition

13. We also affirm the August 2015 Decision and deny the AFR with regard to Walker's Eligibility Petition. As explained above, the Division properly found that the Station's construction permit had expired. Thus, the Station had no valid authorization to protect in the repacking process or spectrum usage rights to relinquish in the reverse auction. Walker contends that the Commission decided to protect WFBT in the *Incentive Auction R&O* when it extended discretionary protection to "new full power television stations that were authorized by construction permits, but not yet licensed, as of February 22, 2012,"⁴⁷ but the Division rejected this argument on procedural and substantive grounds. As the Division explained, the Commission limited the new full power stations that would be extended discretionary protection under this category to four specific stations that were already licensed or had a valid construction permit.⁴⁸ We agree with the Division on procedural grounds that Walker's Eligibility Petition amounts to an untimely request for reconsideration of the *Incentive Auction R&O* because it seeks to have its facility added to the limited category of the four new full power stations the Commission specifically identified in the *Incentive Auction R&O*.⁴⁹ The deadline for seeking such reconsideration passed nearly nine months prior to Walker filing its Eligibility Petition.⁵⁰

14. We also affirm the Division's finding on the merits that the Station does not qualify for discretionary protection. The Commission's rationale for extending discretionary protection to the four new full power stations identified in the *Incentive Auction R&O* was based on a combination of two factors: (1) the stations' construction permits expired after the Spectrum Act's enactment date, but the licensees made significant investments in construction prior to that date, as evidenced by the fact that

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also August 2015 Decision at 2, 3. As explained above, however, Walker's failure to file LMR documentation by the expiration of its construction permit resulted in automatic forfeiture. See *supra* para. 11 and note 41. The staff request for the missing LMR documentation following expiration of WFBT's construction permit was inconsistent with both the statute and the Commission's rules and is therefore not binding on the Commission. See, e.g., *Comcast Corp.* 526 F.3d at 769; *In the Matter of 159 Applications for Authority to Construct and Operate Multipoint Distribution Service Stations at Six Transmitter Sites*, Memorandum Opinion and Order on Reconsideration, 10 FCC Rcd 11141, para. 52 (1995) ("When the staff advice is contrary to the Commission's rules, the Commission may still enforce its rules, despite any reliance by the public.") (citing *Malkan FM Associates v. FCC*, 935 F.2d 1313 (D.C.Cir.1991)).

⁴⁷ *Incentive Auction R&O*, 29 FCC Rcd at 6656, para. 196.

⁴⁸ August 2015 Decision at 5. See *Incentive Auction R&O*, 29 FCC Rcd at 6656, n.647 ("WACP, Atlantic City, New Jersey, WMWC, Galesburg, Illinois, and KUKL-TV, Kalispell, Montana are now licensed. The construction permit for the one remaining station in this category, WMDE, channel 5, Seaford, Delaware, was originally scheduled to expire in May 2014, but has been tolled pursuant to § 73.3598(b) of our rules.") (emphasis added).

⁴⁹ Walker notes that WFBT was included in the Greenhill Report, AFR at 15 n.39, however, the Greenhill Report included a disclaimer that it is "subject in all respects to the detailed terms of" the *Incentive Auction R&O*, which, as explained above, does not provide for protection of WFBT. See *Incentive Auction Opportunities for Broadcasters* (Oct. 2014), available at <http://wireless.fcc.gov/incentiveauctions/learn-program/docs/ia-opportunities-book.pdf>.

⁵⁰ Section 405(a) of the Act and Section 1.429 of the Rules required petitioners to seek reconsideration of the *Incentive Auction R&O* no later than thirty days after publication in the *Federal Register*, which occurred on August 15, 2014. 47 U.S.C. § 405(a); 47 CFR § 1.429(d). See also 47 CFR § 1.4(b)(1); 79 FR 48442. A Petition for Reconsideration of the *Incentive Auction R&O* was due by September 15, 2014. The Commission may not waive the statutory deadline for seeking reconsideration absent extraordinary circumstances, which Walker has not attempted to demonstrate. See e.g., *Reuters Ltd. v. FCC*, 781 F.2d 946, 951-52 (D.C. Cir. 1986).

three of the four stations were licensed and providing service by time the *Incentive Auction R&O* was adopted in May 2014;⁵¹ and (2) the minimal impact that protection would be likely to have on our repacking flexibility, because each station was licensed or authorized on a VHF channel and/or in a remote location where we anticipated that our repacking needs will be limited.⁵² Applying these factors, Walker has not demonstrated that it is similarly situated to the four protected stations and does not qualify for discretionary protection.

15. First, Walker is unlike the four new full power stations to which we extended protection because all held valid construction permits with an issuance date before the Spectrum Act's enactment date, but an expiration date after February 22, 2012. While Walker was also issued a construction permit prior to February 22, 2012, its construction permit by its terms expired almost three years before that date. Walker asserts that it, like the other four new full stations, had to take on "significant costs" to construct WFBT⁵³ in order to provide broadcast television service to the public, but its argument is undermined by the fact that it stranded these investments prior to the Spectrum Act's enactment by failing to commence broadcast service. Indeed, WFBT has never provided service to the public. Walker could have avoided any stranded investments and had WFBT licensed and operational by timely filing the LMR interference study required under its construction permit.

16. Second, protecting Walker's facility would be likely to significantly impact our repacking flexibility in the area where it is located. Walker was authorized to construct a facility on channel 14, which is a UHF channel, not a VHF channel. The authorized construction site for WFBT is also located in upstate New York, approximately 100 miles from the border with Canada. Repacking of the UHF band in this area is likely to be subject to numerous constraints from both international and domestic broadcast television stations, and protecting Walker's facility would limit our repacking flexibility there.

C. Petition for Reconsideration

17. We also dismiss Walker's PFR of the *Application Procedures Public Notice*. The PFR "[f]ails to identify any material error, omission, or reason warranting reconsideration" of the *Applications Procedures Public Notice*.⁵⁴ Furthermore, the relief requested by Walker is outside the scope of the order for which reconsideration is being sought.⁵⁵ The Wireless Telecommunications Bureau in the *Application Procedures Public Notice* did not make any substantive determinations regarding broadcaster eligibility for protection in the repacking process or participation in the reverse auction; it merely provided a list of the broadcast facilities already deemed eligible by the Commission or the Media Bureau on delegated

⁵¹ The construction permit for the one remaining station was tolled as of May 2014. *Incentive Auction R&O*, 29 FCC Rcd at 6656, para. 196. That station was subsequently licensed in October 2014. See BLCDT-20141001CBV.

⁵² *Incentive Auction R&O*, 29 FCC Rcd at 6656, para. 196.

⁵³ AFR at 15.

⁵⁴ 47 CFR § 1.429(l)(1); see 47 CFR § 1.429(c) (a petition for reconsideration must state with "particularity the action taken that should be changed.").

⁵⁵ 47 CFR § 1.429(l)(5).

authority.⁵⁶ For the reasons set forth above, the Station was properly excluded from this list based on the Commission's and the Media Bureau's prior decisions. Walker's PFR identifies no material error, omission, or reason warranting reconsideration of the eligible station list included in the *Application Procedures Public Notice*.

18. On alternative and independent grounds, we deny Walker's PFR. Walker's argument that it should be treated as eligible pending final resolution of its challenges to the August 2015 Decision lacks merit.⁵⁷ The Commission in the *Incentive Auction R&O* provided for such treatment only of licensed full power and Class A stations that are subject to a non-final license validity proceeding or downgrade order.⁵⁸ Walker has never held a license for WFBT and as such is not entitled to such treatment.

IV. ORDERING CLAUSES

19. ACCORDINGLY, IT IS ORDERED that, pursuant to section 5(c)(5) of the Communications Act of 1934, as amended, 47 U.S.C. § 155(c)(5), and section 1.115(g) of the Commission's rules, 47 CFR § 1.115(g), the Application for Review IS DENIED.

20. IT IS FURTHER ORDERED that, pursuant to Section 405 of the Communications Act of 1934, as amended, 47 U.S.C. § 405, and section 1.429 of the Commission's Rules, 47 CFR § 1.429, the Petition for Reconsideration IS DISMISSED AND/OR DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

⁵⁶ *Application Procedures Public Notice*, 30 FCC Rcd at 11272-336, Appendix I (coverage area and population served of each television station to be protected in the repacking process). The facilities listed in Appendix I are those "that were licensed by the Pre-Auction Licensing Deadline, that received a waiver of that licensing deadline, that were explicitly excepted from that deadline (such as those stations impacted by the destruction of the World Trade Center), and those for which the Media Bureau granted a Petition for Eligible Entity Status." *Applications Procedures Public Notice*, 30 FCC Rcd at 11045, n.45; see *Eligibility Public Notice*, 30 FCC Rcd 6153 (establishing a preliminary list of eligible facilities and a procedure for requesting eligible station status for facilities excluded from list). We note that Appendix I was updated on November 12, 2015. See *Incentive Auction Task Force Releases Revised Baseline Data and Prices for Reverse Auction; Announces Revised Filing Window Dates*, 30 FCC Rcd 12559 (WTB, 2015).

⁵⁷ PFR at 3; see *Incentive Auction R&O*, 29 FCC Rcd 6722-23, paras. 362-64.

⁵⁸ *Incentive Auction R&O*, 29 FCC Rcd at 6722-23, paras. 362-63 (defining "license validity proceeding" as a proceeding regarding the expiration or cancellation of a license). In the *Second Order on Reconsideration* the Commission clarified that continued eligibility for stations subject to a non-final license validity proceeding only applies to stations "that previously held full power or Class A licenses." *Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, GN Docket No. 12-268, Second Order on Reconsideration, 30 FCC Rcd 6746, 6783, para. 81 (2015).

**CONCURRING STATEMENT OF
COMMISSIONER AJIT PAI**

Re: *Walker Broadcasting Company, Inc. Application for License to Cover Construction Permit, Application for Construction Permit and Petition for Eligible Entity Status, WFBT(DT), Bath, New York, Fac. ID No. 72623, File Nos. BLCDDT-20090402AOD and BPCDDT-20080319ADH; Application Procedures for Broadcast Incentive Auction Scheduled To Begin on March 29, 2016; Technical Formulas for Competitive Bidding, AU Docket No. 14-252; GN Docket No. 12-268; WT Docket No. 12-269.*

The Media Bureau found below that Walker Broadcasting Company forfeited its construction permit under section 73.3598(e) of the Commission's rules. In its Application for Review, however, Walker fails to challenge this conclusion and doesn't even mention that rule. This omission alone, in my view, is fatal to Walker's case. As a result, I do not express any view as to whether the underlying determination that Walker forfeited its construction permit is correct.

It is also worth noting that Walker did not diligently pursue its broadcast television license. After sending information to Commission staff on September 21, 2010 regarding its license application, Walker made no effort to verify that its message had been received and by its own admission did not contact the Commission again regarding this matter until May 28, 2015. This four-and-a-half year gap in communicating with the Commission substantially undermines any equitable argument that Walker's former station, WFTB, should receive discretionary protection in the incentive auction.

**STATEMENT OF
COMMISSIONER MICHAEL O'RIELLY**

Re: *Walker Broadcasting Company, Inc. Application for License to Cover Construction Permit, Application for Construction Permit and Petition for Eligible Entity Status, WFBT(DT), Bath, New York, Fac. ID No. 72623, File Nos. BLCDDT-20090402AOD and BPCDDT-20080319ADH; Application Procedures for Broadcast Incentive Auction Scheduled To Begin on March 29, 2016; Technical Formulas for Competitive Bidding, AU Docket No. 14-252; GN Docket No. 12-268; WT Docket No. 12-269.*

Although I support today's decision, I have some concerns about the events that got us here. First, this serves as another example of the perils of providing discretionary protection to a select class. By expanding the class of television stations eligible to participate in the incentive auction, the Commission subjects itself to legal challenges from other entities that think they are similarly situated and entitled to relief.⁵⁹ Although the Commission's decision may be well-intentioned, the preferable approach would have been to implement the Spectrum Act as written.

Additionally, going forward, we should look to improve our application review and licensing processes. The construction permit at issue automatically expired on April 3, 2009. However, the station appeared to be active and an incomplete application for a license to cover the construction permit remained pending in the Commission's database, allowing the entity to file an amendment on May 28, 2015, more than six years later. Instead, the status of the construction permit should have been updated to reflect the expiration and the application should have been dismissed years earlier. I am pleased to hear that the Media Bureau's new licensing system will contain improvements that should rectify this problem in the future.

⁵⁹ *Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, GN Docket No. 12-268, Order on Reconsideration, FCC 16-12, at 23 (Feb. 12, 2016).