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

In the Matter of	)	
	)	
Foundation for a Beautiful Life, Inc.	)	
	)	
DKQEK-LP, Cupertino California	)	Facility ID No. 196541
	)	
Application for Covering License	)	File No. BLL-20180518APL
	)	
Application for Modification of Construction Permit	)	File No. BMPL-20180705AAQ
	)	
	)	
Motion for Stay	)	

MEMORANDUM OPINION AND ORDER

Adopted: October 22, 2021 **Released: October 25, 2021**

By the Commission:

I. INTRODUCTION

1. We have before us two Applications for Review (AFR) filed in 2019 and 2020, respectively, by Foundation for a Beautiful Life, Inc. (FBL),[1] which held a Permit to construct a new Low Power FM (LPFM) station, KQEK-LP, Cupertino, California (Station).[2] In the 2019 AFR, FBL seeks review of an October 7, 2019 letter decision (Reconsideration Decision)[3] in which the Media Bureau (Bureau) declined to reconsider earlier dismissals of two FBL applications. The dismissed applications sought to: (1) license facilities constructed at an unauthorized site (License Application),[4] and (2) modify the underlying Permit so that it would match the facilities actually constructed (Modification Application).[5] In the 2020 AFR, FBL seeks review of an April 16, 2020 letter order in which the Bureau required FBL to stop broadcasts from the unauthorized site, which FBL had resumed in March 2020.[6] For the reasons discussed below, we dismiss in part and deny in part the 2019 AFR and deny the 2020 AFR. We also dismiss as moot FBL's request to stay, while awaiting action on the AFRs, the order to stop broadcasting from the unauthorized site.

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[1] FBL, Application for Review (rec. Nov. 6, 2019) (2019 AFR); FBL, Application for Review (rec. Apr. 29, 2020) (2020 AFR).

[2] *See* Application File No. BNPL-20131114BFN (rec. Nov. 14, 2013 and granted May 19, 2015) (Permit). Because the Station's authorization has been cancelled, the Station is now identified in the Commission's licensing database as DKQEK-LP.

[3] Foundation for a Beautiful Life, Letter Order (MB Oct. 7, 2019).

[4] *See* Application File No. BLL-20180518APL (rec. May 18, 2018) (License Application).

[5] *See* Application File No. BMPL-20180705AAQ (rec. July 5, 2018) (Modification Application).

[6] See FBL, Cease Operation Order (MB Apr. 16, 2020) (Cease Order).

II. BACKGROUND

[13] *See* Letter from James D. Bradshaw, Senior Deputy Chief, Audio Div. Media Bureau, FCC, to FBL (Sept. 28, 2018) (Modification Dismissal Letter). The Modification Dismissal Letter noted the Apollo Site was 6.3 km closer to KRZZ(FM), San Francisco, California than permitted and FBL would, therefore, need to show that the proposed short-spacing would not result in interference. *See* 47 CFR § 73.807(e)(1). FBL acknowledged interference with the KRZZ signal, but argued that it was inconsequential because it would occur only in the residence of the Apollo Site owner, who was willing to accept the interference. The Bureau rejected FBL's claim as not accounting for other residents of the home or future sales of the property. *See* Modification Dismissal Letter at 1.

2. In 2015, FBL obtained a Permit to construct a new LPFM station with an antenna mounted on an existing electric distribution tower operated on public parkland by Pacific Gas and Electric, Inc. (PG&E Site). The Permit required construction to be completed by May 19, 2018.[7] FBL filed a timely License Application on May 18, 2018, certifying that it had constructed as authorized. However, in response to objectors who reported that they were unable to locate any communications facilities at the PG&E Site,[8] FBL acknowledged that it had actually constructed the Station 3.5 miles away from its authorized site.[9] The constructed facilities, which differed in several additional respects from those in the Permit, were located at a private residence on Apollo Heights Court in Saratoga, California (Apollo Site).[10] FBL claimed that this discrepancy resulted from a miscommunication with its engineers and should not be decisional because it had no intent to deceive.[11] As a further response to the informal objections, on July 5, 2018, FBL filed the Modification Application which, for the first time, sought authority to substitute the Apollo Site facilities for the PG&E Site facilities. On July 18, 2018, two organizations filed joint comments asking the Bureau to excuse the nonconforming construction and grant the License Application because permit forfeiture is severe and prevents the Asian-American community from receiving a "critically needed resource."[12] The Bureau dismissed the Modification Application on September 28, 2018, because it did not comply with the Commission rule pertaining to second-adjacent channel distance separations and did not justify a waiver of that rule.[13] FBL sought reconsideration.[14]

3. On March 28, 2019, the Bureau issued a consolidated decision, which dismissed both the License Application and the Modification Petition for Reconsideration.[15] The Bureau dismissed the

[7] Section 319(b) of the Communications Act of 1934, as amended (Act) and section 73.3598(e) of the Rules provide that a station's construction permit forfeits automatically if the station is not ready for operation by the construction deadline. *See* 47 U.S.C. § 319(b); 47 CFR § 73.3598(e).

[8] *See* Roger Papesh, Petition to Deny, Application File No. BLL-20180518APL (rec. May 20, 2018); Frank M. Magarelli on Behalf of South Bay Public Radio, Objection, Application File No. BNPL-20131114BFN (rec. June 15, 2018). The Bureau treated the filings as informal objections.

[9] *See* FBL Opposition to Petition to Deny and Informal Objection (rec. June 27, 2018) at 5, Exh. 2 at 1 (2018 Opposition).

[10] The Permit for the PG&E Site specified an existing 30-meter tower, 335.9 meters above sea level, at a tower height above average terrain (HAAT) of 93 meters, and with an effective radiated power (ERP) of 0.01 Watts. FBL constructed a new 6.1-meter pole at the Apollo Site, 639.5 meters above sea level, with a HAAT of 358.3 meters and an ERP of 0.001197 Watts. *See* March Letter, *infra* note 15, n.41. We have plotted the Station's 60 dBu service contours from the PG&E Site (Application File No. BP-20131114BFN) and the Apollo Site (Application File No. BMPL-20180705AAQ) and determined that the Apollo Site facilities would provide substantially better coverage than the PG&E Site, especially to the east and southwest. From the PG&E Site, the Station would reach an area over land of 1,512 square kilometers with 2,018,171 people. At the Apollo Site, coverage would increase to 3,200 square kilometers over land with 2,231,131 people, *i.e.,* an increase of approximately 47 percent in area and 10 percent in population.

[11] FBL explained that its local engineer (who was in charge of construction) and its Commission consulting engineer (who was in charge of filing Communications applications) generally had no direct contact and communicated through an intermediary at FBL. The first engineer purportedly asked FBL to have the second engineer seek Commission consent to use the Apollo Site, but FBL staff accidentally failed to convey that request. *See* Reconsideration Decision at 2, n.9. The first engineer constructed at the Apollo Site, purportedly believing that his counterpart had obtained the desired modification. *Id.* FBL characterized these circumstances as an "honest mistake." *Id.* at 5.

[12] *See* Joint Comments of National Diversity Coalition and National Asian American Coalition (Coalitions) (rec. July 18, 2018) at 3.

[14] *See* FBL, Petition for Reconsideration (rec. Oct. 2, 2018) (Modification Petition for Reconsideration).

[15] *See* Letter from Albert Shuldiner, Chief, Audio Div., Media Bureau, FCC to FBL, Letter Order (MB Mar. 28,

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License Application based on findings that the application sought to license facilities other than those specified in the underlying Permit and that the constructed facilities differed substantially from those permitted.[16] The March Letter rejected FBL's comparison of its circumstances to those in *KM*, a case in which the Commission waived rules specifying permit expiration, issued a monetary penalty, and allowed an applicant to correct a construction error.[17] The Bureau noted that the *KM* permittee intended to build at its authorized location and reasonably believed it had done so, but a surveying error resulted in construction 900 feet away.[18] In contrast, the Bureau found that FBL failed to verify the terms of its authorization and fully intended to construct where it did, *i.e.,* 3.5 miles distant, on private residential land rather than on a utility easement running through public parkland, with different tower height and structural characteristics from those authorized.[19] Thus, the Bureau found the instant proceeding to be more like cases in which permittees did not merely miscalculate but, rather, took affirmative steps to construct facilities not specified in an existing permit.[20] Those cases had resulted in automatic permit forfeiture in accordance with governing Commission rules (Rules), statute, and case law.[21] The March Letter acknowledged but did not grant requests from FBL and the Coalitions that the Bureau should excuse the unauthorized construction because permit forfeiture would be severe and eliminate programming needed in the Asian-American community.[22] In response to the Modification Petition for Reconsideration, the March Letter also concluded that the Permit had forfeited automatically on May 19, 2018, because the authorized facilities had not been constructed by the Permit expiration date. Accordingly, the Bureau found that there was no valid permit to modify when FBL filed the Modification Application on July 5, 2018, and that the Modification Application was accordingly void *ab initio*. The March Letter, therefore, dismissed on procedural grounds the Modification Petition for Reconsideration without addressing the merits. FBL, which had been operating the Station under what it purportedly believed was program test authority, ceased operations upon learning of the error[23] although, as will be discussed later, briefly resumed broadcasts again in 2020.

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2019) (March Letter).

[16] *Id.* at 5-6.

[17] *Id. See KM Radio of St. Johns, LLC*, Memorandum Opinion and Order and Notice of Apparent Liability, 19 FCC Rcd 5847 (2004) (*KM*).

[18] March Letter at 5-6.

[19] The distance between the two sites is so substantial that the Modification Application amounted to a "major change" rather than a "minor change" under the Rules then in effect. *See* 47 CFR § 73.870(a) (2018). Specifically, the Rule in effect at the time considered transmitter site relocations up to 5.6 km as "minor" (and thereby permissible outside of a filing window) but the Apollo and PG&E Sites were 5.73 km apart. March Letter at 3.

[20] March Letter at 6, citing *Great Lakes Community Broad, Inc.,* Memorandum Opinion and Order, 24 FCC Rcd 8239, 8252, paras. 23, 45 (2009) (*Great Lakes*); *KSBN Radio, Inc.,* Memorandum Opinion and Order, 19 FCC Rcd 20162, 20168, paras. 3, 16 (2004), *recon. denied,* 23 FCC Rcd 2504 (2008) (*KSBN*).

[21] *Id.* at 5. *See* 47 U.S.C. § 319(b); 47 CFR § 73.3598(e). Commission precedent establishes that construction of unauthorized facilities does not prevent automatic forfeiture. *See, e.g., Tango Radio, LLC,* Memorandum Opinion and Order, 30 FCC Rcd 10564, 10567, para. 6 (2015); *Walker Broad. Co., Inc.*, 31 FCC Rcd 2395, 2399-400, para. 11 (2016), *aff'd*, *Walker Broad. Co., Inc. v. FCC*, No. 16-1118 (D.C. Cir. 2016) (per curiam) (unpublished); *Aerco Broadcasting Corp.*, Memorandum Opinion and Order, 18 FCC Rcd 24417, 24419-20 (2003); *Dan J. Alpert, Esq,* Letter Order, 30 FCC Rcd 4898, 4901 (MB 2015). *See also Chinese Voice of Golden City*, Memorandum Opinion and Order, 35 FCC Rcd 13638, para. 14 (2020) (*Chinese Voice*), *appeal pending sub nom. Chinese Voice of Golden City v. FCC*, File No. 20-1514 (D.C. Cir.); *Eagle Broad. Group, Ltd.,* Memorandum Opinion and Order, 23 FCC Rcd 588, 592, para. 9 (2008), *aff'd sub nom. Eagle Broad. Group, Ltd. v. FCC,* 563 F.3d 545 (D.C. Cir. 2009).

[22] *See* March Letter at 3, 5.

[23] *See* 2018 Opposition, Exh. 2.

4. FBL sought reconsideration of the Bureau's March Letter in a consolidated April 29, 2019 pleading,[24] and the Bureau addressed those arguments in the October 7, 2019 Reconsideration Decision. The Reconsideration Decision dismissed the portion of the Consolidated Petition for Reconsideration pertaining to the Modification Application because the Bureau's March Letter had already dismissed FBL's earlier Modification Petition for Reconsideration, and the Bureau would not entertain a second such request.[25] The Reconsideration Decision also upheld the March Letter's dismissal of the License Application. Among the Bureau's principal holdings were that: (1) the March Letter was consistent with precedent and the Administrative Procedure Act (APA);[26] (2) a four-hour test transmission that FBL conducted from a mobile van at the PG&E Site in September 2017 formed no basis for granting the License Application;[27] (3) even accepting *arguendo* that there was no deceptive intent, that would not of itself prevent expiration of the Permit for failure to complete authorized construction; and (4) the potential diversity benefits of FBL's intended programming for Chinese-American listeners did not warrant a different outcome because all applicants, including those with diverse audiences, must comply equally with our Rules.[28] In an AFR filed November 6, 2019, FBL argues that the Reconsideration Decision: (1) conflicts with statute, regulation, case precedent and Commission policy; (2) makes erroneous findings as to important facts; and (3) makes prejudicial procedural errors.[29]

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[24] FBL, Petition for Reconsideration of Dismissal of License Application and Dismissal of Facilities Modification Application (rec. Apr. 29, 2019) (Consolidated Petition for Reconsideration).

[25] The Bureau observed that FBL had not filed an Application for Review of the March Letter's dismissal of the Modification Petition for Reconsideration. *See* Reconsideration Decision at 4. Among the modification-related arguments that the Reconsideration Decision dismissed were that the March Letter: (1) impermissibly applied the doctrine of void *ab initio*; (2) was inconsistent with the acceptance of a minor modification application in *KM*; (3) was inconsistent with waivers of LPFM mileage separation rules; (4) violated the Local Community Radio Act of 2010, Public Law 111-371, section 5(3) (LCRA) by impermissibly favoring FM translators over LPFM stations because LPFM stations have less flexibility in site selection; and (5) should have addressed the merits of the Modification Petition for Reconsideration, which disputed findings of interference, because consideration of the merits could potentially have removed an obstacle to licensing the Apollo Site. *See* Reconsideration Decision at 4, n.26. The 2019 AFR repeats each of these arguments.

[26] *See* Reconsideration Decision at 5-6; 5 U.S.C. § 550, *et. seq.* The APA requires agencies to engage in rational decision making and to treat similarly-situated applicants similarly. *See Allentown Mack Sales and Service, Inc. v. NLRB,* 522 U.S. 359, 374 (1998); *Melody Music, Inc. v. FCC,* 345 F.2d 730 732 (D.C. Cir. 1965).

[27] The Bureau observed that FBL had not shown circumstances to warrant consideration of this new argument on reconsideration and stated that, in any event, such facilities would not have been licensable. *See* Reconsideration Decision at 7, n.56, citing 47 CFR § 1.106(c); *id.* at n.57, citing *Tango Radio, LLC,* 30 FCC Rcd at 10568, para. 8 (forfeiting construction permit and dismissing license application where permittee did not construct in accordance with permit conditions but may have broadcast briefly from an unauthorized, temporary tower about 100 feet from the authorized site).

[28] *Id.* at 5, 8. The Reconsideration Decision also noted that the agency has declined to provide any special licensing consideration to minority-controlled LPFM applicants because doing so could raise equal protection concerns following the U.S. Supreme Court's *Adarand* decision. *Id.* at 8, n.63, citing *Creation of a Low Power Radio Service,* Report and Order, MM Docket No. 99-25, 15 FCC Rcd 2205, 2262, para. 146 (2000); *Adarand v. Pena,* 515 U.S. 200 (1995) (race-based preferences in federal programs are subject to strict scrutiny). The Coalitions, which had originally supported FBL's argument concerning needs of Asian-American listeners, did not seek reconsideration or Commission review of the Bureau's decisions.

[29] The Rules set forth each of these factors, *inter alia,* as a basis for Commission review. *See* 47 CFR § 1.115(b)(2). Many of the alleged errors pertain to matters that the Reconsideration Decision procedurally dismissed and FBL now alleges that the Bureau did not consider the full record. *See supra* note 25. With respect to matters that the Reconsideration Decision discussed, FBL alleges: (1) a conflict between the Reconsideration Decision, case precedent, and the APA because the Commission has "often excused" "honest mistakes;" (2) reliance upon cases that are distinguishable; (3) misapplication of factors discussed in the *KM* case; (4) failure to credit operation at the authorized site prior to permit expiration; (5) failure to enunciate a useful predictive standard for considering

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5. FBL filed four supplements to the 2019 AFR as well as several other documents between March 2020 and July 2020.[30] The First Supplement noted that California was experiencing a coronavirus (COVID-19) pandemic and requested special temporary authority (STA) to return to the air with pandemic-related information in Mandarin for the Chinese-American community. The Second Supplement notified the Bureau that, upon receiving no response to the First Supplement within two weeks, the Station began to broadcast from the Apollo Site with the facilities specified in its dismissed Modification Application.[31] The Third Supplement transmitted letters from a city councilmember and an organization promoting diversity expressing support for the Station's resumed operations. The Fourth Supplement, as discussed further below, asked the Bureau to apply newly revised Rules for LPFM technical standards to this case.

6. The Bureau ordered FBL off the air in an April 16, 2020 Cease Order in which it: (1) described as "specious" FBL's claim that it had a right to broadcast from the Apollo Site; (2) found that FBL's request to obtain STA to broadcast there was defective; (3) ordered FBL to stop operating; and (4) required FBL and its principals to provide a copy of the Cease Order for consideration in any future applications filed within ten years.[32] FBL would also, without time limit, need to disclose unauthorized operations on any future LPFM applications, effectively disqualifying FBL in the LPFM service.[33] The Bureau noted that it had not acted upon FBL's request for authority to return to the air because FBL's submission of the request as a First Supplement to the 2019 AFR rather than as an independent request for STA obscured the purpose of the filing. The Bureau also rejected FBL's claim that it had a "right" to operate even without STA,[34] and stated that the support of local officials and alleged public safety benefits did not justify unauthorized broadcasts.[35] FBL stated that it removed the Station from the air on

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construction errors; and (6) failure to give proper weight to arguments about diversity and the needs of the Chinese-American community. *See* AFR at 3-4.

[30] FBL, Application for Special Temporary Authority to Resume Broadcasting (rec. Mar. 12, 2020) (First Supplement); FBL, Notice of Resumption of Broadcasting Due to Pandemic (rec. Mar. 27, 2020) (Second Supplement); FBL, Supplement to Notice of Resumption of Broadcasting Due to Pandemic (rec. Apr. 3, 2020) (Third Supplement); FBL, Notice of Cessation of Broadcasting (rec. Apr. 17, 2020); FBL, Motion for Stay (rec. Apr. 29, 2020) (Stay Request); FBL, Supplement to Application for Review (rec. July 23, 2020) (Fourth Supplement).

[31] The broadcasts continued for 22 days, from March 27, 2020 through April 17, 2020. *See* 2020 AFR at 2.

[32] The Cease Order includes the following provision in its ordering clauses: "IT IS FURTHER ORDERED that Foundation for a Beautiful Life (and its principals, Ling Gao, Hong Yan, and Lee Song, as well as any entity in which any of them holds an interest that is within the scope of the ownership and control disclosure standard set forth in 47 CFR § 1.2112) SHALL SUBMIT a copy of this Letter Order with every application that any of them file with the Commission for a period of ten years of the date from this Letter Order." Cease Order at 3.

[33] The application for a permit to construct a new LPFM station requires applicants to certify that no party to the application has engaged in unlicensed operation in violation of 47 U.S.C. § 301. *See* FCC Form 318, Section II, Quest. 8. Applicants unable to make that certification are ineligible. *Id.,* Instructions to Section II, Quest. 8. *See* Pub. L. No. 106-553, 114 Stat. 2762 (2000) (Appropriations Act), amended by Pub. L. No. 111-371, 124 Stat. 4072 (2011) (prohibiting "any applicant from obtaining a low power FM license if the applicant has engaged in any manner in the unlicensed operation of any station in violation of section 301 of the Communications Act of 1934"); 47 CFR § 73.854.

[34] FBL claimed such a right under several alternative theories including program test authority, lack of finality of dismissal of its applications, the Commission's grant of pandemic-related waivers in other circumstances, and section 307(c) of the Act which allows license renewal applicants to operate after license expiration until final action on a license renewal application. The Bureau characterized FBL's position as specious because it relied on provisions of the Act and Rules that the Bureau found inapplicable to the instant circumstances. *See, e.g.,* 47 U.S.C. § 307(c)(3); 47 CFR §§ 73.801, 73.1620(a).

[35] *See* Cease Order at n.11, citing *A-O Broadcasting Corp.,* Memorandum Opinion and Order, 23 FCC Rcd 603

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April 17, 2020.[36]

7. On April 29, 2020, FBL filed the 2020 AFR arguing that the Bureau's Cease Order incorrectly required FBL to stop broadcasting. FBL simultaneously filed the Stay Request, seeking to delay implementation of the Cease Order. FBL separately sought a court order of mandamus to require the Commission to act on FBL's Stay Request so that FBL might operate from the Apollo Site pending action on the 2019 and 2020 AFRs. The court denied mandamus on June 26, 2020.[37]

8. Also in April 2020, the Commission revised several of its Rules in the *LPFM Technical* proceeding.[38] In response, FBL filed the Fourth Supplement on July 23, 2020, to request that the Commission apply two of the newly-revised Rules to FBL even though the Commission had stated in the rulemaking proceeding that the new Rules would not apply to cases in which the agency had already issued a decision under prior Rules. FBL raised similar arguments in a petition for reconsideration in the rulemaking proceeding which FBL also submitted in the instant proceeding as an attachment to the Fourth Supplement.[39] The Commission dismissed and alternatively denied FBL's rulemaking petition for reconsideration on June 15, 2021.[40]

III. DISCUSSION

9. We dismiss the four Supplements to the 2019 AFR and deny them on alternative and independent grounds,[41] dismiss the 2019 AFR in part, and otherwise deny the 2019 AFR. We uphold the

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(2008), *recon. dismissed, Barry D. Wood,* Letter Order, 24 FCC Rcd 13666 (MB 2009).

[36] *See* FBL Notice of Cessation of Broadcasting (rec. Apr. 17, 2020).

[37] *Found. for a Beautiful Life, Inc.*, No. 20-1159 (D.C. Cir. June 26, 2020) (per curiam).

[38] *See Amendments of Parts 73 and 74 to Improve the Low Power FM Radio Service Technical Rules,* Report and Order, MB Docket Nos. 19-193, 17-105, 35 FCC Rcd 4115 (2020) (*LPFM Technical*), *recon. denied*, Order on Reconsideration, MB Docket No. 19-193, FCC No. 21-70 (adopted June 15, 2021) (*LPFM Technical Recon.*), *appeal pending sub nom*. *Foundation for a Beautiful Life v. FCC*, No. 21-71266 (9th Cir.).

[39] *See* Fourth Supplement, Exh. 1 (FBL Petition for Reconsideration, MB Docket Nos. 19-193, 17-105 (rec. May 26, 2020) (Rulemaking Reconsideration Petition)). The Rulemaking Reconsideration Petition was opposed by REC Networks. *See* REC Networks, Opposition to Petition for Reconsideration, MB Dockets 19-193, 17-105 (rec. July 28, 2020).

[40] *See LPFM Technical Recon.* at 17-21.

[41] The Rules require that the application for review and "any supplemental thereto" must be filed within 30 days of public notice of the Bureau action. 47 CFR § 1.115(d). Here, FBL filed the first three Supplements over five months after the Bureau's October 2019 Reconsideration Decision and did not seek a waiver of Section 1.115(d). While FBL did seek a waiver to file its Fourth Supplement, filed over nine months after the Bureau's October 2019 Reconsideration Decision, we deny the waiver. FBL argues that the Commission's April 2020 decision to revise section 73.870 to expand the distance an LPFM station can move as a "minor" change was a significant development that occurred after the filing of the November 2019 AFR. Fourth Supplement at n.1. In fact, the Commission proposed to revise section 73.870 in a July 2019 Notice of Proposed Rulemaking, before the filing of FBL's November 2019 AFR. *Amendments of Parts 73 and 74 to Improve the Low Power FM Radio Service Technical Rules*, MB Docket Nos. 19-191, 17-105, Notice of Proposed Rulemaking, 34 FCC Rcd 6537 (2019) (NPRM). Thus, FBL should have been aware of the potential revision of section 73.870 and the impact on its application when it filed its November 2019 AFR. In challenging the Bureau's October 2019 Reconsideration Decision, FBL had the opportunity to argue that it supported the proposal to revise section 73.870 and that, if adopted, the proposed rule should result in a favorable determination on FBL's application. FBL, however, did not reference the proposal to revise section 73.870 when challenging the Bureau's October 2019 Reconsideration Decision. In addition, as the Commission noted previously, FBL did not file comments in response to the NPRM. *LPFM Technical Recon.* at para. 17. For that reason, we deny FBL's waiver to file the Fourth Supplement. On alternative and independent grounds, we consider the four Supplements and deny them on the merits for the reasons discussed herein.

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Bureau's determination that FBL's construction of unauthorized facilities at an unauthorized location could not serve as the basis for grant of the License Application. Similarly, we agree with the Bureau's finding that the Permit expired prior to the filing of the Modification Application, thus requiring dismissal of the Modification Application. As is explained in greater detail below, on alternative and independent grounds, we find that the Modification Application is inconsistent with our Rules for modifying construction permits and thus must be denied on its merits. Nor will we apply the newly revised Rules to FBL or waive the Rules in effect at the time that FBL's applications were dismissed. Further, we deny the 2020 AFR concerning FBL's desire to operate pending the outcome of this proceeding. We affirm the Cease Order's rulings that FBL's 2020 operation at the Apollo Site was unauthorized and that any future broadcast applications by FBL or its principals within ten years must include a copy of the Cease Order to facilitate our consideration of the impact of such unauthorized operation on future applications.[42] Having denied the 2020 AFR, we dismiss as moot the Stay Request seeking to delay implementation of the Cease Order.

10. *License Application.* We agree with the Bureau's determination that it could not grant the License Application. The purpose of a broadcast license application is to certify or "cover" construction that is in accordance with the terms of an underlying construction permit.[43] When FBL filed its License Application, however, there were no facilities constructed at the permitted PG&E Site to cover. We affirm the Bureau's rejection of the argument that FBL's four hours of test transmissions in September 2017 from a mobile production van with a telescoping mast parked temporarily at the PG&E Site amounted to completion of construction prior to the Permit's expiration and, thus, prevented automatic permit expiration.[44] We find that the Bureau appropriately dismissed that argument procedurally because it was presented for the first time on reconsideration of the March Letter.[45] On alternative and independent grounds, we affirm the Bureau's decision that FBL's argument is without merit because the facilities were not permanent, and soon removed. Permittees cannot rely on temporary facilities to satisfy construction requirements or to avoid automatic forfeiture pursuant to section 73.3598(e) of the Rules.[46] Nor could the facilities FBL constructed at the unauthorized Apollo Site form a basis for license grant because those facilities differed substantially in location, height, and power from those specified in the Permit.[47] Therefore, the Permit forfeited automatically on its own terms for failure

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[42] *See supra,* note 32. Also, any future LPFM applications by FBL or its principals would need to respond negatively to the question in our applications that asks LPFM applicants to certify no prior unauthorized broadcasts. *Id.,* note 33.

[43] *See* 47 CFR §§ 73.3536(a), 73.1620(a).

[44] FBL has not specified the exact technical parameters of the test facilities but has characterized them as "consistent with the construction permit." 2019 AFR at 20; Consolidated Petition for Reconsideration at 13. FBL has stated that the purpose of the test was to demonstrate the signal's propagation to the Parks Department. Consolidated Petition for Reconsideration, Exh. 2., para. 11, site 10. If we assume *arguendo* that FBL conducted the test with the power and antenna height specified in the Permit, the record does not explain how it could have transmitted from the exact location, given that extending the mobile van's telescoping mast at the Permit site (a PG&E transmission tower) presumably would be within the path of the high-power PG&E electric wires.

[45] FBL mentioned the test transmissions in opposition to informal objections to the License Application, see *supra* note 8, as part of a description of its efforts to investigate potential sites, not to establish that it timely completed construction requirements. Reconsideration Decision at 7. Rather, on reconsideration of the March Letter, FBL for the first time argued that its four hours of test transmissions amounted to completion of construction. FBL, however, failed to demonstrate why it could not have presented this argument earlier and did not show that consideration of this argument was necessary in the public interest. 47 CFR § 1.106(c).

[46] *See Tango Radio, LLC*, 30 FCC Rcd at 10568, para. 8.

[47] *See id*. at 10567, paras. 7-8 (explaining that "[a]ll broadcast permittees must, by the construction deadline specified in each construction permit . . . build in accordance with all terms of the construction permit") (citing 47

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to complete authorized construction by the May 19, 2018 deadline.[48]

11. FBL repeats that favorable action is warranted because its construction at the Apollo Site was an "honest mistake" and lacked deceptive intent.[49] FBL asserts that its construction and use of unauthorized facilities without deceptive intent is similar to the *KM* case where the Commission upheld grant of a waiver for what FBL argues are similar non-conforming facilities.[50] As discussed above, *KM* involved a small variance of 900 feet, difficult to detect without a resurvey of the property, and did not cause any interference. In contrast, FBL built its unauthorized facility 3.5 miles away from its authorized site and operations of the unauthorized facility would cause prohibited interference to an existing full-service FM station. While both cases may involve honest mistakes, the differences in these mistakes make these matters distinguishable. Whereas *KM* involved a harmless construction error that could be rectified consistent with our Rules, FBL's error involved failing to seek modification of its permit and building facilities that could not be licensed consistent with our Rules. Even had FBL timely requested a waiver of the construction deadline, which it did not,[51] the present case does not involve the "unique circumstances" present in *KM.*[52] We note in particular that the substantial variance in FBL's construction and short-spacing toward an existing full-service FM station on a second-adjacent channel would have prevented FBL from certifying that its facilities would cause no interference, as is required to receive a waiver of second-adjacent spacing requirements under Section 73.807(e). The distance between the authorized and unauthorized sites, in excess of 5.6 km, also meant that the proposed move could, under rules in effect at that time, only be requested within an application filing window, of which there was none. FBL's mistaken belief of authority to build at the Apollo Site was without any reasonable basis because it did not verify that belief by examining its Permit or the Commission's licensing database.[53]

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CFR § 73.3598(a), (e)). *See Walker Broad. Co., Inc.*, 31 FCC Rcd at 2399-400, para. 11; *Aerco Broadcasting Corp.*, 18 FCC Rcd at 24419-20. *See also Eagle Broad. Group, Ltd.,* 23 FCC Rcd at para. 9.

[48] Reconsideration Decision at 3, citing 47 CFR § 73.3598(e).

[49] *See* AFR at 17-20. FBL cites several cases in which it claims the Bureau has applied an "honest mistakes" policy. All of the cited cases are Bureau-level and thus not binding on the Commission. *Id*. at 18-20. *See Comcast Corp. v. FCC*, 526 F.3d 763, 769 (D.C. Cir. 2008).

[50] *Id.*

[51] It merely relied upon the *KM* case in its reconsideration argument that permit expiration was too harsh. *See* Consolidated Petition for Reconsideration at 16-17, 22.

[52] *See* Reconsideration Decision at 6. The Bureau correctly noted that waivers are fact-specific and that there were unique circumstances warranting a waiver in *KM. Id.* at n.42, citing *KM,* 19 FCC Rcd at 5850, para. 9. These factors included the small degree (900 feet) of variance; use of the authorized antenna mounted at the authorized height; the permittee's belief that it was constructing at the authorized location; no resulting short-spacing; no need for Federal Aviation Administration approval; and lack of competitive advantage by use of the different location. *Id.* We reject FBL's argument that its construction at the Apollo Site should be viewed as "substantially the same" as that authorized at the PG&E Site due to FBL's balancing of parameters such as decreasing its power output to adjust for higher elevation. *See* 2019 AFR at 22; *see also KSBN Radio, Inc.,* Memorandum Opinion and Order, 23 FCC Rcd 2504, 2504-05, paras. 1-3 (2008) (affirming permit expiration because construction of 114-foot fiberglass whip antennas without prior approval did not fulfill the terms of permit to build 285-foot steel towers despite permittee's claim that the towers were of "identical electrical height"). Although FBL notes that a decrease in coverage area was a factor in *KM,* and claims that the Bureau ignored that factor in the instant case, FBL provides no data to demonstrate that the unauthorized construction at the Apollo Site resulted in a loss of coverage. *See* 2019 AFR at 22; Consolidated Petition for Reconsideration at 16. To the contrary, as discussed in note 10 *supra,* we have determined that transmissions from the Apollo Site would reach a larger area and population than that from the PG&E Site. We find no basis for FBL's suggestion otherwise, especially given that our plots of the 60 dBu contours from the Apollo and PG&E Sites match those in the technical exhibits FBL submitted with its applications. *See* Application File Nos. BP-20131114BFN and BMPL-20180705AAQ, Technical Exhibits.

[53] Reconsideration Decision at 2-3. As the Bureau noted, FBL had no construction permit in hand for the Apollo

(continued….)

FBL's error ultimately resulted in substantially nonconforming facilities at an unpermitted, short-spaced location.[54] Moreover, the error of FBL staff to coordinate with its two engineers by failing to inform one of the need to file an FCC application for a new site and to verify the filing and approval of such an application is not grounds for favorable action because it is well-settled that applicants and licensees are responsible for the errors of their employees and contractors and that such errors are not grounds to waive deadlines.[55] Because these errors resulted in construction that could not be licensed consistent with our Rules, no matter the intent, we cannot find the dismissal to be unduly harsh. The Bureau's Reconsideration Decision in the instant proceeding is consistent with the Bureau's treatment of a factually similar siting error as non-correctible and distinguishable from *KM*.[56] Therefore, we deny the 2019 AFR with respect to dismissal of the License Application.

12. *Modification Application*. We uphold the Bureau's dismissal of the Modification Application. For the reasons discussed above, the construction permit was automatically forfeited on May 19, 2018 because it was not ready for operation in accordance with authorized parameters by that date.[57] FBL filed the Modification Application on July 5, 2018, several weeks after the Permit had been automatically forfeited. Because the Permit was forfeited, there was no Permit to modify, and thus we affirm the Bureau's dismissal of the Modification Application.[58]

13. We reject FBL's argument that had the Bureau first considered the merits of its modification-related arguments, FBL might have satisfied the Bureau's concerns, potentially allowing the Bureau to reinstate and modify the Permit, and license the facilities as constructed.[59] FBL particularly

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Site and had not explained why it could not have verified its authorized location by checking the Commission's licensing database, a task that can be done in minutes. *Id.*

[54] We also note that FBL has not addressed the issue of timeliness. The Commission has stated that permittees should generally file requests for waivers of construction deadlines within 30 days of the event upon which the request is based, the same standard that applies to requests to toll the deadline. *See Birach Broad. Corp.,* Memorandum Opinion and Order, 18 FCC Rcd 1414, 1416, para. 8 (2003). Here, FBL never filed a waiver request of the construction deadline and the first time it sought to justify construction at the unauthorized facility was *after* the Permit's May 19, 2018 construction deadline. Specifically, in a June 27, 2018 filing, FBL first acknowledged that it had mistakenly constructed at the Apollo Site without prior approval, stated that it would be filing a modification application, and requested "permission from the Commission to correct this inadvertent error." 2018 Opposition at 2.

[55] *See, e.g., Guam Power II*, Memorandum Opinion and Order, 33 FCC Rcd 11273, 11274-75, paras. 4 and 7 (2018) (affirming Bureau finding that engineer's failure to timely file long-form application was not grounds to waive filing deadline); *Roy E. Henderson*, Memorandum Opinion and Order, 33 FCC Rcd 3385, 3387-88, para. 6 (2018) (rejecting argument that licensee's engineer was to blame for station's unauthorized operations).

[56] *See Chinese Voice of Golden City*, Memorandum Opinion and Order, 35 FCC Rcd 567, 568-70, paras. 7, 13 (MB 2020), *aff'd, Chinese Voice,* 35 FCC Rcd at 13638. (upholding expiration of license under Section 312(g) for extended failure to operate as authorized, dismissing license modification application, and distinguishing *KM* in proceeding where LPFM applicant was licensed pursuant to a second-adjacent channel waiver, operated for more than one year with mobile facilities 256 feet from the authorized site and/or 2.27 miles from authorized site, and did not justify second-adjacent waiver at the new locations), *appeal pending sub nom. Chinese Voice of Golden City v. FCC*, File No. 20-1514 (D.C. Cir.).

[57] 47 U.S.C. § 319(b).

[58] *See JNE Investments, Inc.,* Memorandum Opinion and Order, 23 FCC Rcd 623, 632, para. 24 (2008) ("One cannot modify a permit that is no longer valid."); *WYCQ, Inc.*, Memorandum Opinion and Order, 18 FCC Rcd 16900, 16904, para. 9 (2003) (where license expired as a matter of law due to extended silence, modification application became moot because there was no longer any station license to modify).

[59] 2019 AFR at 9-13. FBL argues that: (1) the Modification Application was not defective; (2) FBL and the Apollo Site owner took subsequent actions to address the interference issue; (3) it is "illogical" to deny new service to a large known population out of concern for a small "unknowable" number of future buyers of the Apollo Site; and (4)
(continued….)

disputes the Bureau's characterization of the Modification Application as void *ab initio* given that the agency has, in cases like *KM,* acted favorably on modification applications that correct permittee errors.[60]

14. We agree with the Bureau that the Modification Application was void *ab initio* because it was filed several weeks after FBL's Permit expired.[61] FBL argues that the Commission has never adopted the principle of void *ab initio*[62] because a strict definition of that phrase would prohibit Commission discretion to grant waivers,[63] which in turn would be contrary to precedent like *KM* where the Commission has been able to grant waivers.[64] We disagree. The Commission has long recognized the principle of void *ab initio* in many contexts.[65] Contrary to FBL's contention, the concept is independent of the Commission's discretion to grant waivers. Although the Commission can waive a rule if it finds (1) special circumstances warrant a deviation from the general rule, and (2) such deviation will serve the public interest,[66] we have determined above that a waiver is not warranted in the instant circumstances and that the *KM* waiver is inapposite.[67] Accordingly, we find that dismissal of FBL's Modification Application was proper.

15. On alternative and independent grounds, we find that dismissal of the Modification Application is appropriate because FBL failed to justify a waiver of two separate, spacing-related Rules (sections 73.870 and 73.807) that would have been required for favorable action on the Modification Application. First, the Modification Application conflicted with section 73.870, which prohibits the filing of major modification applications outside a filing window.[68] FBL's proposed move was considered a

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the Bureau should treat as *de minimis* the 0.13 km distance by which the proposed modification exceeds the 5.6 km standard for "minor" changes. *Id.* at 9-10, citing 47 CFR § 73.208(c)(8). We note that the Rule FBL cites does not apply to LPFM applications, but that there was a 5.6 km LPFM standard for a minor change LPFM application in 2018, when the Modification Application was filed and then dismissed as non-compliant with the Rules. *See* 47 CFR §§ 73.801, 73.870(a) (2018). Effective as of October 30, 2020, the 5.6 km standard for an LPFM minor change application was changed to 11.2 km. *See Filing of Applications*, 85 Fed. Reg. 68474, 68480-81 (Oct. 29, 2020).

[60] 2019 AFR at 13-14. FBL repeats claims that the Commission has recognized differences between intentional and unintentional errors in a number of contexts. *See, e.g., id.* at 18-19, citing *Community Radio of Decorah,* Memorandum Opinion and Order, 31 FCC Rcd 12180, 12184 (2016) (C. Pai, concurring) (Commissioner Pai viewed LPFM applicant's incorrect cross-ownership certification as intentional rather than negligent and, thus, would not have treated it as a non-decisional, honest mistake). FBL also repeats claims that *KM* is controlling and that cases cited by the Bureau are not similar to the instant case. *Id.* at 16-17, citing *Great Lakes,* 24 FCC Rcd at 13487, *KSBN,* 19 FCC Rcd at 20162. For example, FBL notes that *Great Lakes* involved a false certification. AFR at 16.

[61] *See* March Letter at 7.

[62] 2019 AFR at 13.

[63] *Id.* at 15.

[64] *Id.* at 14-17.

[65] *See, e.g., Gwendolyn May,* Memorandum Opinion and Order, 33 FCC Rcd 7571 (2018) (grant of application to assign expired television construction permit was void *ab initio*); *Comparative Consideration of 37 Mutually Exclusive Groups of Applications to Construct New or Modified Noncommercial Educational FM Stations,* Memorandum Opinion and Order, 26 FCC Rcd 7008, 7040, para. 97 (2011) (a conflict in applicant's by-laws did not render a permit grant void *ab initio*); *In re Rice,* Memorandum Opinion and Order, 17 FCC Rcd 4111 (2002) (rejecting argument that Commission exceeded its authority and that its actions were thus void *ab initio*); *Radio KDAN, Inc.,* Memorandum Opinion and Order, 11 FCC 2d 934, n.1 (1968) (contract provision retaining reversionary interest void *ab initio*).

[66] *See Northeast Cellular Tel. Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990), citing *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969).

[67] *See supra,* para. 11.

[68] *See* 47 CFR § 73.870(b).

"major" modification under the Rules then in effect because the move exceeded 5.6 km.[69] FBL submitted the Modification Application outside of a filing window, without timely requesting and justifying a waiver of section 73.870.[70] Second, because FBL's proposed modified site was short-spaced to KRZZ(FM), a full power station on a second-adjacent channel, the Modification Application sought to satisfy the requirements for a waiver of the spacing requirement in section 73.807(e). Yet this request did not provide a major required component, *i.e.,* a showing that no harmful interference to the KRZZ(FM) signal would occur, such as a demonstration that the area is unpopulated.[71] FBL provides no support for its claim that a waiver is also warranted in populated areas if the population is small and willing to accept

[69] *See* 47 CFR § 73.870(a) (2018) and note 59 *supra*. As we discuss *infra,* the Commission (a) in April 2020 adopted a new Rule which redefined LPFM minor changes as those up to 11.2 km, but stated that the new Rule would apply only to LPFM applications that were not the subject of any staff determinations as of the effective date of the new rules, and (b) in June 2021 rejected FBL's petition for reconsideration of this decision. *See infra*, para. 17, and *LPFM Technical,* 35 FCC Rcd at 4134, para. 48. Accordingly, the relevant standard for FBL continues to be the 5.6 km figure in effect at the time of the staff decision in September 2018.

[70] At the time of the staff decision in September 2018 (as well as the subsequent reconsideration decisions in March 2019 and October 2019), an LPFM facility move qualified as minor if it did not exceed 5.6 km. *See* 47 CFR § 73.870(a) (2018). FBL proposed to move a greater distance of 5.73 km. FBL did not request a waiver of section 73.870 prior to the expiration of its Permit or in the post-Permit-expiration Modification Application. It requested a waiver of that provision on the same day as the Modification Application by filing a supplement to its opposition to a petition to deny the License Application. *See* FBL Supplement to Opposition to Petition to Deny and Informal Objection at 5 (rec. July 5, 2018). The Bureau has waived the 5.6 km requirement in cases where applicants timely demonstrated: (1) a lack of viable sites within 5.6 km; and (2) that the station's 60 dBu service contours at the existing and relocated sites would overlap. *See LPFM Technical,* para. 17, citing*, Southside Media Collective*, File No. BMPL-20150720AAH (granted July 22, 2015); *Sloan Canyon Communications*, File No. BMPL-30240623AAG (granted Dec. 22, 2014). The Modification Application's engineering statement did not request a waiver of the 5.6 km standard and, thus, did not make such a showing. FBL's waiver request in its supplemental pleading simply argued that the Bureau should treat the 0.13 km by which it exceeded 5.6 km standard as *de minimis* as the Commission has treated relatively small differences in other contexts. *See* FBL Supplement to Opposition at 3-4, citing 47 CFR § 73.208(c)(8) (permitted rounding of distances to the nearest kilometer in FM allotment proceedings); *Calvary Chapel of Redlands,* Letter Order, 31 FCC Rcd 12694, 12695, n.16 (MB 2016) (LPFM stations considered fully-spaced despite being 0.3 km closer than nominally permitted because that overage rounds down to 0) (*Redlands*). We reject that argument. The Rule provision that FBL cites, 47 CFR § 73.208(c)(8), permits rounding for a limited purpose, *i.e.,* to calculate distances between reference points for full-serve FM stations when amending the FM Table of Allotments. That calculation uses somewhat complex trigonometric equations to compute distances between latitude and longitude coordinates and expressly permits rounding of the results to the nearest kilometer. In contrast, the instant case involves 47 CFR § 73.870(a), which contains no rounding language because LPFM stations are not subject to an allotment process and, therefore, have no allotment reference points to compute. LPFM rules are designed to be simple so that non-profit organizations with limited engineering expertise can readily apply for, construct, and operate community-oriented stations serving highly localized areas. *See LPFM Technical,* 34 FCC Rcd at 6537, para.2. The purpose of section 73.870(a) is to establish a bright line test of whether an LPFM site move would maintain service to a significant portion of its original service area and, thus, should be permitted without providing an opportunity for others to file conflicting proposals. At the time, the Commission allowed moves of up to 5.6 km without such an opportunity because that is the maximum distance in any direction of the 60 dBu contour of an LPFM signal with 100 watts ERP. *See* 47 CFR § 73.811(a). Had the Commission desired to use whole numbers to determine whether an LPFM change was major or minor, it would have set 6 km rather than 5.6 km as the benchmark. The *Redlands* case that FBL cites is Bureau-level and thus not binding on the Commission. *See Comcast Corp. v. FCC*, 526 F.3d 763, 769 (D.C. Cir. 2008). In any event, while the case involves an LPFM station, it is not on point. In *Redlands*, the Bureau rounded minimum distance separations between stations, which are expressed in whole numbers and required to avoid interference. *See* 47 CFR § 73.807.

[71] *See* 47 CFR § 73.807(e)(1) (entertaining waivers of LPFM second-adjacent spacing requirements upon a showing that no actual interference will occur due to intervening terrain or lack of population). The Modification Application acknowledged interference as discussed *infra. See* Modification Application, Exh. C-1, C-2, C-3.

the interference.[72] We find this argument inconsistent with a statutory requirement in the Local Community Radio Act, which states that the LPFM stations seeking waiver pursuant to this section "must establish . . . that its proposed operations will *not result in interference to any authorized radio service*."[73] Accordingly, we affirm the Bureau's decision declining to grant FBL's requested waiver pursuant to section 73.807(e).[74]

16. Nor do we accept FBL's argument that the Commission treated FBL disparately in violation of the APA and/or the LCRA. FBL contends that its ability to relocate and to avoid interference was constrained by the Commission's more favorable treatment of other broadcasters, including the availability of spectrum for FM translator stations that rebroadcast AM stations and the requirement that LPFM applicants use sites that meet distance separations to existing stations, whereas FM translator stations have considerably more flexibility under a contour protection method.[75] As the Commission has stated in the *LPFM Technical* proceeding, simplified procedures in the LPFM service enable non-profit organizations with limited expertise and small budgets to build community-oriented stations serving highly localized areas.[76] The greater complexity and interference remediation obligations associated with contour protections are not best suited for the LPFM service outside of a waiver context.[77] Nor, as the Commission has explained previously, does the LCRA's "equal in status" language require licensed

[72] On reconsideration, FBL acknowledged an area of interference to the KRZZ(FM) signal that includes one home, but claimed that the population within that home is not cognizable because the homeowner, spouse, and heirs would all accept interference to the KRZZ(FM) signal and that the station currently broadcasts in Spanish, a language they do not understand. Modification Petition for Reconsideration at 2. FBL proposed a conditional waiver so that the Commission could, if desired, terminate the waiver if the station begins to program in English or if the property is sold. *Id.; see* also Consolidated Petition for Reconsideration at 14-15.

[73] LCRA, section 3(b)(2); 47 CFR § 73.807(e)(1) (emphasis added). The conditional waiver approach proposed by FBL does not meet this standard because its proposed operations will result in interference to the KRZZ(FM) signal. Although the LCRA, section 3(b)(2) allows the Commission to take "into account all relevant factors, including terrain sensitive propagation models" in predicting whether any interference will occur, LCRA, section 3(b)(2) as implemented through Section 73.807(e)(1) does not give the Commission the discretion to excuse interference simply because the population or area receiving the interference is small or amenable to the interference. *Id.*

[74] *See supra,* note 10.

[75] *See* 2019 AFR at 25, citing Reconsideration Petition at 21-22. Under the contour protection method, which generally is performed by a consulting engineer, the Commission will authorize an FM translator facility if its proposed contours do not overlap those of an existing station. In contrast, the Commission will authorize an LPFM station if it shows, usually without engineering assistance, that its proposed facilities would be separated by at least a minimum distance from existing stations. The distance separation method is simpler and inexpensive to prepare but provides less flexibility in identifying site locations.

[76] *LPFM Technical,* 35 FCC Rcd at 4115, para. 2.

[77] *Id.* at 4137, para. 54.

LPFM and FM translator stations to operate under identical rules.[78] The Commission has understood that language as simply requiring priority neither to new LPFM stations nor to new FM translators when making spectrum available for initial licensing.[79]

17. We recognize, as FBL notes in its Fourth Supplement, that the Commission revised the Rules for the LPFM service after the Bureau's Reconsideration Decision, but while the 2019 and 2020 AFRs were pending. However, we are not persuaded with FBL's contention that its Modification Application would be grantable under the revised Rules and that the Commission should apply the revisions thereto because dismissal is not yet final.[80] The Commission has considered and rejected virtually identical contentions that FBL raised in a rulemaking proceeding.[81] The Commission affirmed therein that the revisions only apply prospectively to LPFM applications that were not the subject of any staff determinations as of the effective date of the new rules.[82] The Commission affirmed that the revisions would not apply to applications like FBL's, for which the staff rendered a decision before the effective date of the new rules.[83] Even if we applied the new rules, the Modification Application would not be grantable because it has flaws not addressed by the rule revisions.[84] Specifically, although the rule revisions would bring the proposed move within a distance that would now be considered "minor," they would not alter the fact that the Modification Application was filed after expiration of the Permit and would cause interference[85] to the signal of a second-adjacent channel station.[86]

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[78] LCRA § 5 ("The Federal Communications Commission, when licensing new FM translator stations, FM booster stations, and low-power FM stations, shall ensure that . . . (3) FM translator stations, FM booster stations, and low power FM stations remain equal in status and secondary to existing and modified full-service FM stations."). *See Creation of a Low Power Radio Service,* MM Docket No. 99-25, Fifth Order on Recon. and Sixth Report and Order, 27 FCC Rcd 15402, 15426, n.139 (2012).

[79] *LPFM Technical,* 35 FCC Rcd at para. 54, n.149.

[80] *See* Fourth Supplement at 4.

[81] *See LPFM Technical Recon.* at paras. 17-21 (dismissing and, alternatively denying, FBL's argument).

[82] *Id*.

[83] *Id.* (explaining that when adopting new application processing procedures, the Commission needs to establish a definitive cut-off point for transition to the new requirements in order to promote administrative efficiency and to provide clear guidance to applicants, and that the Commission struck a reasonable balance between giving effect to the new rules while avoiding the need to revisit prior administrative action).

[84] The only revision in the *LPFM Technical* proceeding that would be material is a change to section 73.870 to expand the distance an LPFM station can move as a "minor" change from 5.6 km to 11.2 km. The proposed relocation from the PG&E site to the Apollo Site is under 11.2 km.

[85] FBL argues that the *LPFM Technical* proceeding expanded permissible use of directional antennas and that it could now install a directional antenna to solve the section 73.807 interference issue that prevented an earlier grant. *See* AFR at 4. However, the revised antenna provisions adopted in the *LPFM Technical* proceeding had no impact on FBL. FBL could have proposed a directional antenna at the time of application because directional operations have long been permissible to justify second-adjacent channel spacing waivers of the type FBL seeks. Yet FBL did not do so.

[86] As discussed above, we reject FBL's argument that interference to the KRZZ signal is inconsequential because it would occur only in the residence of the Apollo Site owner, who was willing to accept the interference. *See supra,* notes 13 and 72.

18. *Broadcasts During Pandemic.* For the reasons discussed below, we deny the 2020 AFR of the Cease Order.[87] FBL contends that its broadcasts should not be considered unauthorized because it sought STA,[88] and was merely trying to provide information during an emergency pandemic.[89] FBL maintains that the Bureau should have granted special temporary authority for its broadcasts based on its "very noble objective…to help save lives," the support of local officials, and lack of any interference complaints.[90] FBL argues that the Act and the Rules contemplate grants of temporary operating authority, especially in life-threatening emergencies, and that the Commission does not always require a formal application for STA in such situations.[91] FBL also contends that the Bureau improperly treated FBL as equivalent to a "pirate" broadcaster by requiring FBL and its principals to report unauthorized operations in future applications.[92]

19. We affirm the Cease Order, including its finding that FBL's operations were unauthorized and must be reported on any applications by FBL or its principals in the next ten years. The Commission recognizes that the COVID-19 virus is a life-threatening public health crisis and that communication during this crisis is critical. The Commission and its staff have thus, where appropriate, facilitated certain related broadcast and non-broadcast responses.[93] None of those responses, however, have approved the unlicensed use of the broadcast spectrum. Section 301 of the Act prohibits unlicensed broadcasts without regard to the content of the broadcast.[94]

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[87] Having denied the 2020 AFR, we dismiss as moot the Stay Request seeking to delay implementation of the Cease Order.

[88] 2020 AFR at 4-5, 15-19.

[89] *Id.* at 11.

[90] *Id.* at ii, 1-2, 10-12, 15. In the 2020 AFR, FBL now submits additional evidence that the community supported and appreciated the broadcasts. *Id.* at Exhibit A. It also raises additional allegations, including that the Bureau: (1) incorrectly ruled that the manner in which FBL requested STA was defective; (2) did not take into account unusual circumstances, *i.e.,* that FBL did not yet have an underlying license but, rather, an application for review of a license application dismissal and a call sign that had been deleted; (3) relied on *A-O Broadcasting* in giving no weight to local support although that case differed factually; (4) acted arbitrarily by failing to stay the Cease Order under section 1.102(b) of the Rules; and (5) deprived FBL of due process by not allowing continued broadcasting pending finality of the Bureau's action. 2020 AFR at 12-15, 18-19, citing 5 U.S.C. § 558, 23.

[91] *Id.* at 7, citing 47 U.S.C. § 309(c), 47 CFR §§ 73.1250, 73.1635, 73.3542.

[92] FBL argues that, unlike pirate broadcasters, it held a permit and had requested STA. *See* 2020 AFR at 21-23, citing *Gerlens Cesar,* Notice of Apparent Liability for Forfeiture, 34 FCC Rcd 12734(2019) (subsequent history omitted). FBL also argues that its circumstances are unlike those of *E-String Wireless, Ltd.*, a case cited in the Cease Order. *See E-String Wireless, Ltd.*, Memorandum Opinion and Order and Notice of Apparent Liability for Forfeiture, 31 FCC Rcd 133 (MB 2016) (monetary forfeiture where grant of license for station constructed with improperly oriented antenna had become final and there was no evidence of fraud).

[93] For example, the Commission has waived deadlines to construct certain broadcast stations, facilitated telemedicine, promoted the use of funding from the Coronavirus Aid, Relief, and Economic Security (CARES) Act, and provided consumer tips to avoid COVID-related phone scams. *See Promoting Telehealth for Low-Income Consumers COVID-19 Telehealth Program,* Report and Order, WC Docket Nos. 18-213, 20-89, FCC 20-44 (rel. Apr. 2, 2020); *Availability of Construction Deadline Waivers for Certain FM Translator Stations Awarded in Auction 99 and 100,* Public Notice, DA 20-1059 (MB Sept. 10, 2020); FCC Partners with Institute of Museum and Library Services to Address Digital Divide During COVID-19, News Release (rel. May 21, 2020); FCC Consumer Advisory: COVID Scams, News Release (rel. Mar. 20, 2020).

[94] *See* 47 U.S.C. § 301.

20. The Bureau properly concluded that FBL had no authority to operate from the Apollo Site and that its claim otherwise was unfounded. Thus, FBL was operating as a pirate.[95] FBL's reliance on section 307(c)(3) of the Act[96] is not persuasive, as it only permits operation during the pendency of a license renewal application. Here, FBL never held a license and thus had no application for renewal pending.[97] FBL nonetheless argues that section 307(c)(3) "provides guidance to the Commission that it should give great consideration and review before ordering a station off the air."[98] We disagree. Section 307(c)(3) expressly refers to "contin[uing] such *license* in effect,"[99] but FBL never had a license, thus there was no "license" to "continue." To the extent Congress wanted to permit an applicant like FBL to broadcast from a station that violates the terms of a construction permit, it would have addressed that subject in section 319 pertaining to construction permits. But Section 319 contains no language similar to Section 307(c)(3).[100]

21. Nor could FBL have qualified, as claimed, to operate the Station under automatic program test authority. Any such authority could not begin absent FBL's completion of permanent facilities at the PG&E Site prior to expiration of its Permit in accordance with the terms and conditions of that Permit.[101] FBL did not, as claimed, have operating authority due to the lack of finality of the Station's deletion while the 2019 AFR was pending. As the Bureau stated, staff actions under delegated authority take effect, notwithstanding lack of finality, upon release of the document or of a public notice announcing the action.[102] While it is possible under section 1.102(b) to stay the effectiveness of a decision the Cease Order stated that the 2019 deletion of the Station had not been stayed, and that FBL had no right to operate pending review.[103] In the 2020 AFR, FBL submits a new argument that the Bureau's prohibition of operations during the pendency of the 2019 AFR amounts to a sanction without reasonable notice or opportunity to achieve compliance under section 558(c) of the APA.[104] We dismiss this argument on procedural grounds because it was not presented to the Bureau.[105] On alternative and independent grounds, we deny this claim. Section 558(c) of the APA pertains to "the withdrawal, suspension, revocation or annulment of a license."[106] The D.C. Circuit has explained that "[a] license that

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[95] "Pirate Radio Broadcasting" is defined as "the transmission of communications on spectrum frequencies between 535 and 1705 kilohertz, inclusive, or 87.7 and 108 megahertz, inclusive, without a license issued by the Commission. . . ." 47 U.S.C. § 511(h).

[96] 47 U.S.C. § 307(c)(3).

[97] *See* Cease Order at 2.

[98] 2020 AFR at 10.

[99] 47 U.S.C. § 307(c)(3) (emphasis added).

[100] *Government of Guam v. United States*, 950 F.3d 104, 114 (D.C. Cir. 2020) ("where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion") (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983)).

[101] *Id. See* 47 CFR §§ 73.801, 73.1620(a) (permitting program tests "upon completion of construction . . . *in accordance with the terms of the construction permit*") (emphasis added).

[102] Cease Order at 2-3, citing 47 CFR § 1.102(b).

[103] *Id.* at 2, n.10. While FBL notes that the Bureau protects from use by other parties the frequency of a station that has had its call sign deleted until administrative and judicial remedies have been exhausted, 2020 AFR at 17-18, this policy avoids the issuance of "conflicting authorizations for any facilities that might impair, or appear to impair, a fair and impartial review," but it does not give a station a right to broadcast without a license. Silver State Broadcasting, LLC, Letter Order, BSTA-20200107AAL (MB, Jan. 8, 2020).

[104] *See* 2020 AFR at 18-19.

[105] *See* 47 CFR § 1.115(c).

[106] *See* 5 U.S.C. § 558(c) (emphasis added).

expires on its own terms is not protected by" 5 U.S.C. § 558(c).[107] Here, as discussed above, through operation of section 319(b) and the terms of the Permit, FBL's Permit was forfeited automatically on May 19, 2018 because the authorized facilities were not constructed by that date.

22. Because FBL had no existing authority to operate, the legality of its 2020 broadcasts centers upon whether it received STA before beginning to operate. It did not. In fact, the non-standard manner in which FBL requested STA delayed the Bureau's awareness of the request[108] and FBL unilaterally began to operate before the Bureau acted.[109] We acknowledge, as FBL now argues, that there are certain circumstances in which a licensed station can receive STA through an informal request, such as by telephoning the staff to report an equipment malfunction and receiving immediate oral approval to implement an STA.[110] Such circumstances are not present here, where FBL has never been licensed and also never sought oral staff approval prior to resuming operation. The mere fact that the Bureau had not yet acted on the STA request does not convey any operating authority.

23. Consistent with the Cease Order, we acknowledge FBL's claims that: (1) the Station's overall broadcasts in Mandarin would bring a "critically needed" resource to the Chinese-American community; (2) the pandemic-specific broadcasts would provide Mandarin speakers with important health information; and (3) local officials had expressed their support.[111] While we support these important benefits, they do not outweigh our statutory responsibility in preventing unauthorized broadcasts.[112]

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[107] *Atlantic Richfield Co. v. United States*, 774 F.2d 1193, 1201 (D.C. Cir. 1985). *See Miami MDS Co. v. FCC*, 14 F.3d 658, 659-60 (D.C. Cir. 1993) (section 558(c) does not apply to a construction permit that expired by its own terms on a specified date).

[108] The ordinary manner in which to request temporary authority is in a stand-alone STA request. When the staff receives such a request, it can readily ascertain the purpose of the filing. FBL, however, filed its request as a supplement to the 2019 AFR. *See* Cease Order at 2. The purpose of that supplement was not immediately apparent to the staff because applicants may supplement their filings for a variety of purposes. Indeed, FBL has supplemented its 2019 AFR several times, in each case for a different purpose. Moreover, FBL did not highlight the now-claimed urgency of its filing by seeking expedited consideration. Rather, when FBL had not received a response within two weeks, it began to operate without inquiring into the status of its then-pending request. We reject FBL's argument that the staff should have recognized the importance of the supplement from its 19-page length. *See* 2020 AFR at 24. We also do not accept FBL's suggestion that its filing of a supplement was the most reasonable option due to unusual circumstances, *i.e.,* that the Station had never been licensed, its call sign had been deleted, and it had only the 2019 AFR as active in the Commission's database. *Id.* at 23-25. If FBL is suggesting that the Commission's electronic filing system would not have accepted a stand-alone STA request, it is wrong. The deletion of a call sign and status as a former permittee does not preclude filing of a request for STA. *See Daytona Beach Broadcasting Association*, Memorandum Opinion and Order, 33 FCC Rcd 2732, n.20 (2018) ("the deletion of a call sign pursuant to the expiration of a permit or license does not preclude the filing of an application in CDBS, and the Bureau, under certain circumstances, has in fact accepted applications filed by permittees and licensees after the expiration of their authorization and deletion of the station's call sign"). Moreover, the Bureau had established email procedures for any applicant needing to request a COVID-related STA outside of the electronic filing system. *See Audio Division Announces Procedures Related to Coronavirus,* Public Notice, DA 20-266 (MB Mar. 13, 2020) ("Requests for Special Temporary Authority should be filed using the CDBS database. Any requests that cannot be filed in CDBS should be submitted by email to all of the following [staff members].").

[109] FBL explains that it identified two possible reasons for not receiving a response: (1) the staff was too busy with other requests; or (2) the staff supported FBL's lifesaving goal but was balancing the benefits of possible grant against the creation of precedent applicable to other STA requests. *See* 2020 AFR at 24-25. FBL argues that it was reasonable to broadcast under those assumptions and that it could not have anticipated the negative result. *Id.* We disagree. Indeed, we note that FBL's choice to proceed unilaterally without Commission authority mirrors the manner in which it commenced construction at the Apollo Site based solely on its own incorrect, unverified belief that its engineer had filed a request to modify the construction permit for the PG&E Site. *See supra* para. 11.

[110] *See* AFR at 25.

[111] *Id.*

24. We reject FBL's claim that the facts of a case relied upon in the Cease Order, *A-O Broadcasting,* are distinguishable.[113] This case held that alleged public safety benefits and the support of local officials do not justify unauthorized broadcasts. FBL maintains that *A-O Broadcasting* involved a community that was able to receive public safety broadcasts from multiple sources, whereas FBL was the only broadcaster providing programming to Cupertino solely in Mandarin.[114] The Commission's primary basis for STA denial in *A-O Broadcasting* was that the former licensee no longer held a permit or license.[115] The Commission discussed the availability of other stations as a secondary factor, and only because the former licensee had raised the issue. Moreover, FBL's claim to be the sole broadcaster able to provide adequate pandemic-related information to the Chinese-American community is overstated. While FBL claims that it was the only local broadcaster operating *exclusively* in Mandarin at all hours, it acknowledges that Cupertino receives an FM station that broadcasts partially in Mandarin.[116] Moreover, information about COVID-19 is available to Mandarin speakers via other sources. For example, the State of California's website on COVID-19 provides information in multiple languages, including "Chinese (Traditional)" and "Chinese (Simplified)."[117]

25. Finally, the Bureau was correct in requiring FBL and its principals to disclose unauthorized operations in any future applications. Section 301 of the Act prohibits unlicensed broadcasting.[118] Moreover, we are statutorily prohibited in granting an LPFM license if the applicant has engaged in any manner in the unlicensed operation of any station in violation of Section 301.[119] Operations at the Apollo Site were unlicensed and unacceptable and yet FBL certified that it had constructed as authorized. The existence of a serious health crisis, while important, is not a mitigating factor; it does not override licensing requirements or justify a unilateral use of the public airwaves without prior authority. Where, as here, an applicant with no other Commission authorizations has engaged in unauthorized operations but certified compliance, it is unnecessary to undertake an immediate assessment of the applicant's character qualifications but also important to prevent the routine processing of any subsequent applications so that the Commission has the opportunity to consider character matters, if it deems appropriate at that time.[120] Accordingly, we reject FBL's arguments against the requirement that

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[112] *See* 47 U.S.C. § 301

[113] *A-O Broadcasting Corp.,* Memorandum Opinion and Order, 23 FCC Rcd 603 (2008), *recon. dismissed, Barry D. Wood,* Letter Order, 24 FCC Rcd 13666 (MB 2009) (*A-O Broadcasting*) (holding that alleged public safety benefits and the support of local officials do not justify unauthorized broadcasts).

[114] *See* 2020 AFR at 12-14. FBL states that 23 percent of Cupertino's residents are Chinese and that there is also a significant Chinese-speaking population in nearby parts of Santa Clara County within the Station's coverage area. *Id.* at 14.

[115] *A-O Broadcasting*, 23 FCC Rcd at 613, para. 19-20, citing 47 CFR § 73.1635. Section 73.1635 provides that an STA is limited to "permittees or licensees." 47 C.F.R. § 73.1635. Like A-O, FBL did not hold a permit or license when it sought STA and is therefore ineligible for STA under the FCC's Rules.

[116] Specifically, FBL notes that KSQQ(FM), Morgan Hill, CA broadcasts in Mandarin but also for a portion of the day in Portuguese. *See* 2020 AFR at 4, n.7. FBL also notes that KEST(AM), San Francisco, CA broadcasts primarily in Cantonese and partially in Mandarin in the San Francisco Bay Area, although its signal does not reach Cupertino. *Id.* FBL also notes that KVTO(AM), Berkeley, CA and KTSF(TV), San Francisco, CA broadcast in Cantonese. *Id.*

[117] *See* https://covid19.ca.gov/translate/ (last visited July 30, 2021).

[118] 47 U.S.C § 301.

[119] Pub. L. No. 106-553, 114 Stat. 2762 (2000) (Appropriations Act), amended by Pub. L. No. 111-371, 124 Stat. 4072 (2011) (prohibiting "any applicant from obtaining a low power FM license if the applicant has engaged in any manner in the unlicensed operation of any station in violation of section 301 of the Communications Act of 1934"); 47 CFR § 73.854.

[120] *See Chinese Voice of Golden City,* Memorandum Opinion and Order, 35 FCC Rcd 567, 572-73, paras. 16, 20

(continued….)

FBL and its principals submit a copy of the Cease Order with applications to which any of them are a party for the following ten years. We further note that to the extent that FBL or any of its principals may wish to apply in a future LPFM filing window (not limited in time), they would have to respond negatively to the certification of no unauthorized operations and attach an explanation referencing this proceeding.

IV. ORDERING CLAUSES

26. **ACCORDINGLY, IT IS ORDERED** that the Application for Review filed by Foundation for a Beautiful Life, Inc. on November 6, 2019 **IS DISMISSED IN PART AND OTHERWISE DENIED**, pursuant to section 5(c)(4)-(5) of the Communications Act of 1934, as amended, and section 1.115(c), (g) of the Commission's Rules.[121]

27. **IT IS FURTHER ORDERED** that the Supplements filed on March 12, 2020; March 27, 2020; April 3, 2020; and July 23, 2020 to the Application for Review filed by Foundation for a Beautiful Life, Inc. on November 6, 2019 **ARE DISMISSED AND OTHERWISE DENIED**, pursuant to section 5(c)(4)-(5) of the Communications Act of 1934, as amended, and section 1.115(d), (g) of the Commission's Rules.[122]

28. **IT IS FURTHER ORDERED** that the Application for Review filed by Foundation for a Beautiful Life, Inc. on April 29, 2020, **IS DISMISSED IN PART AND OTHERWISE DENIED**, pursuant to section 5(c)(4)-(5) of the Communications Act of 1934, as amended, and section 1.115(c), (g) of the Commission's Rules.[123]

29. **IT IS FURTHER ORDERED** that the Motion for Stay filed by Foundation for a Beautiful Life, Inc. on **IS DISMISSED AS MOOT**.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

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(2020), *review denied in relevant part,* Memorandum Opinion and Order, FCC 20-179, para.17 (rel. Nov. 25, 2020), *appeal pending sub nom. Chinese Voice of Golden City v. FCC*, File No. 20-1514 (D.C. Cir.).

[121] 47 U.S.C. § 155(c)(4)-(5); 47 CFR § 1.115(c), (g).

[122] 47 U.S.C. § 155(c)(4)-(5); 47 CFR § 1.115(d), (g).

[123] 47 U.S.C. § 155(c)(4)-(5); 47 CFR § 1.115(c), (g).