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

In the Matter of	)	
	)	
Family Stations, Inc.	)	BNPFT-20190731AAZ
	)	Facility ID No. 203018
New FM Translator, El Cajon, California	)	
	)	
Positive Hope Inc.	)	BPL-20190909ABO
	)	Facility ID No. 197704
KVIB-LP, San Diego, California	)	

MEMORANDUM OPINION AND ORDER

Adopted: April 19, 2022 **Released: April 19, 2022**

By the Commission:

I. INTRODUCTION

1. In this Memorandum Opinion and Order, we dismiss in part and otherwise deny the Application for Review (Application for Review) filed by Positive Hope, Inc. (Positive Hope). Positive Hope seeks review of a letter decision (*Reconsideration Letter*)[1] by the Audio Division, Media Bureau (Bureau) that reinstated the above-referenced new FM translator application, as amended (Amended Translator Application) filed by Family Stations, Inc. (Family) on September 6, 2019, and upheld the Bureau's dismissal of the above-referenced modification application filed by Positive Hope on September 9, 2019 (KVIB-LP Modification Application).[2] In light of receiving Mexican concurrence for the proposed facilities, we also grant the Amended Translator Application.

II. BACKGROUND

2. In 2019, the Commission conducted Auction 100, which resolved through competitive bidding mutually exclusive proposals for new cross-service FM translators to be paired with AM stations.[3] At the conclusion of Auction 100, Family was the winning bidder for a new cross-service translator station at El Cajon, California (Translator) on Channel 261.[4] On July 31, 2019, following Auction 100 procedures, Family filed its original long-form application (Translator Application). On August 2, 2019, Bureau staff dismissed the Translator Application because the proposed facility violated the contour overlap requirements established by the *1992 Agreement Between the Government of the United States of America and the Government of the United Mexican States Relating to the FM Service in*

[1] *Matthew H. McCormick, Esq.*, Letter Order, 35 FCC Rcd 6465 (MB June 24, 2020).

[2] On August 13, 2020, Family filed an opposition to the Application for Review (Opposition). On September 4, 2020, Positive Hope filed a reply to the Opposition (Reply).

[3] *See Auction of Cross-Service FM Translator Construction Permits Scheduled for June 25, 2019, Notice and Filing Requirements, Minimum Opening Bids, Upfront Payments, and Other Procedures for Auction 100*, Public Notice, 34 FCC Rcd 2231 (MB/OEA 2019).

[4] *Auction of Cross-Service FM Translator Construction Permit Closes—Winning Bidders Announced for Auction 100*, Public Notice, 34 FCC Rcd 5212, Attach. A (MB/OEA 2019).

the Band 88-108 MHz, August 11, 1992 (USA-Mexico Agreement).[5] On August 13, 2019, amendments to our Part 74 translator interference rules took effect that allow translator licensees, permittees, or applicants to mitigate interference by changing channels to any available frequency.[6] On September 6, 2019, Family submitted a petition for reconsideration (Family Petition) and amendment to the Translator Application (Amended Translator Application) seeking to reinstate the Translator Application and move from Channel 261 to Channel 266. This proposed facility, although requiring Mexican concurrence, did not violate the *USA-Mexico Agreement*.

3. On September 9, 2019, Positive Hope filed the KVIB-LP Modification Application, specifying modified facilities on Channel 266 that were mutually exclusive with Family's Amended Translator Application. On September 19, 2019, the Bureau dismissed the KVIB-LP Modification Application for failure to comply with the minimum distance separation requirements with respect to the Translator.[7] On October 10, 2019, Positive Hope filed an informal objection to the Amended Translator Application (Informal Objection) and a petition for reconsideration of the dismissal of the KVIB-LP Modification Application.

4. On June 24, 2020, the Bureau issued the *Reconsideration Letter*, reinstating the Translator Application, as amended, under the Commission's *nunc pro tunc* policy of considering petitions for reconsideration of the dismissal of an application when the applicant submits a relatively minor curative amendment within 30 days of dismissal.[8] The Bureau determined that the amendment was acceptable, as the Commission's rules (Rules) allow a winning bidder filing a long-form application to change the technical proposals specified in its previously submitted short-form application as long as such change does not constitute a major change.[9] This determination was based on the Bureau's finding that Family had satisfied section 74.1233(a)(1)(i)(A)(2) of the Rules,[10] which classifies a non-adjacent channel change in response to a technical showing of interference as a minor change. The Bureau found that Family satisfied the interference criterion by demonstrating the existence of a "sizable zone of potential interference within the contour overlap of the Translator's 25 dBu contour and [a neighboring station's] 45 dBu contour."[11] Lastly, the Bureau rejected Positive Hope's claim that the Translator Application should have been dismissed for failure to protect cancelled station DKRSA-LP, El Cajon, California (DKRSA-LP), which had been assigned to Channel 266. The Bureau explained that, although a third party had filed a petition for reconsideration concerning the cancellation of its license—the DKRSA-LP

[5] *Family Stations, Inc.*, Letter Decision, FCC File No. BNPFT-20190731AAZ (MB Aug. 2, 2019) (*Dismissal Letter*) at 1 (citing *USA-Mexico Agreement*, Article 7, *available at* http://transition.fcc.gov/ib/sand/agree/files/mex-bc/fmbc.pdf (last visited August 11, 2021)). Specifically, the Bureau found that the proposed Translator would cause impermissible contour overlap with XHTY-FM, Tijuana, Baja California, Mexico (XHTY). *Dismissal Letter* at 1.

[6] *Amendment of Part 74 of the Commission's Rules Regarding FM Translator Interference*, Report and Order, 34 FCC Rcd 3457, 3482 (2019) (*Translator Interference Order*), *aff'd on reconsideration*, 35 FCC Rcd 11561 (2020); *Media Bureau Announces August 13, 2019, Effective Date of Amended Rules for FM Translator Interference*, Public Notice, 34 FCC Rcd 7004 (MB 2019).

[7] *Positive Hope Inc.*, Letter Decision, Ref. No. 1800B3-GL (MB Sept. 19, 2019).

[8] *Reconsideration Letter*, 35 FCC Rcd at 6467-68 (citing the *Statement of Future Policy on Incomplete and Patently Defective AM and FM Construction Permit Applications*, Public Notice, 56 RR 2d 776 (Aug. 2, 1984) (as subsequently published in the Federal Register, 49 Fed. Reg. 47331, 47332 (Dec. 3, 1984)) (*Nunc Pro Tunc Policy Statement*)).

[9] *Reconsideration Letter*, 35 FCC Rcd at 6467 (citing 47 CFR § 74.1233(d)(5)(iii)).

[10] Section 74.1233(a)(1)(i)(A)(2) allows non-adjacent channel changes "[u]pon a showing of interference to or from any other broadcast station."

[11] *Reconsideration Letter*, 35 FCC Rcd at 6467.

license cancellation was effective absent a request for stay.[12] On September 14, 2020, the Mexican government notified the Commission's International Bureau by letter of its concurrence with the facilities proposed in the Amended Translator Application.

5. *Timeliness of the Family Petition.* In the Application for Review and the Reply, Positive Hope argues that the Family Petition was procedurally inadmissible under section 1.106(f) of the Rules because it was "tendered" on September 9, 2019, three days after the September 6, 2019, deadline for petitions for reconsideration of the *Dismissal Letter* and on the same day as the KVIB-LP Modification Application.[13] In response, Family submits a CDBS filing confirmation stating that the Family Petition was successfully filed on September 6, 2019.[14] In the Reply, Positive Hope concedes that Family filed the Family Petition on September 6, 2019, but nonetheless argues that "tendering is the act that counts" when determining the timeliness of a petition for reconsideration.[15] Positive Hope asks the Commission to either dismiss the Family Petition and reinstate the KVIB Modification Application, reinstate and compare both applications as mutually exclusive, or dismiss both applications for failure to protect DKRSA-LP.[16]

6. *Reinstatement.* Positive Hope also objects to the Bureau's *nunc pro tunc* reinstatement of the Amended Translator Application because it "essentially evad[es] Section 73.3566(a)'s waiver request requirements."[17] Positive Hope additionally argues that reinstatement under the *nunc pro tunc* processing policy is inappropriate here because Family's reinstatement request and curative amendment were based on an interference claim rather than a showing of any error in the Bureau's original finding that it violated the *USA-Mexico Agreement.* Positive Hope contends that such a request for reinstatement, based on "non-treaty grounds," is improper.[18] Moreover, according to Positive Hope, a treaty violation is not one of the "type of application errors that qualify for *nunc pro tunc* treatment," such as a typographical or other clerical error.[19]

7. Positive Hope further contends that reinstatement is not appropriate when the curative amendment relies on a rule that came into effect after the application was dismissed.[20] In support of this argument, Positive Hope cites to the *Translator Interference Order*, which states that the new translator interference rules apply only to "applications or complaints that have not been acted upon as of the

[12] *Id*. at 6468.

[13] Application for Review at 8-9 (citing 47 CFR § 1.106(f) (requiring that petitions for reconsideration be filed within 30 days of public notice of the action taken, which in this case issued on August 7, 2019. *See Broadcast Actions,* Public Notice, Report No. 49545 (Aug. 7, 2019)).

[14] Opposition, Exh. A.

[15] Reply at 4 (citing 47 CFR § 73.3564(a) ("Applications tendered for filing are dated upon receipt and then forwarded to the Media Bureau, where an administrative examination is made to ascertain whether the applications are complete"; 47 CFR § 1.4(f) (instructing that hand-carried documents must be tendered for filing with the Office of the Secretary before 4 p.m. and electronically filed documents must be received by the electronic filing system before midnight on the filing date)).

[16] Application for Review at 8-10.

[17] *Id*. at 3.

[18] Reply at 3. Family also argues that the Bureau improperly failed to request Mexican concurrence for the facilities originally specified in the Translator Application. Opposition at 4. This argument is moot given the Amended Translator Application specifying another channel and will not be considered further here. Moreover, the Bureau followed its well-established practice of not submitting non-compliant applications for Mexican concurrence.

[19] Application for Review at 4-5 (citing *Nunc Pro Tunc Policy Statement*, 49 Fed. Reg. at 47332).

[20] *Id*. at 7-8; Reply at 5.

effective date [of the rules]."[21] It also cites to the *Emmanuel* decision, in which the Commission denied a petition for reconsideration of the dismissal of a new FM translator station, noting that the new translator interference rules did not affect its analysis because the application was acted upon prior to the rules becoming effective.[22] In the Opposition, Family contends that this argument could have been raised earlier and "ignores the fact that the [Amended Translator Application], the relevant application for which interference mitigation was sought, was not filed until September 6, after the effective date of the rules."[23] Because the Amended Translator Application had not been acted on when the new rules took effect, according to Family, it was eligible to request a channel change under section 74.1233(a)(1)(i)(A)(2).[24]

8. *Eligibility for non-adjacent channel change.* Positive Hope advances the theory that any application that contains no waiver request and is dismissed as defective under section 73.3566(a)[25] becomes a "nullity."[26] As a "nullity," Positive Hope argues, the Translator "creates no interference, so it has none to mitigate."[27] Therefore, according to Positive Hope, Family cannot satisfy the section 74.1233(a)(1)(i)(A)(2) criterion that a non-adjacent channel change applicant must show interference to or from any other broadcast station.

9. Positive Hope also contends that Family's requested channel was not an available channel for the purposes of section 74.1233(a)(1)(i)(A)(2) because the cancellation of LPFM station DKRSA-LP on that channel was still under appeal and not yet final when the Translator Application was originally filed.[28] In support of this argument, Positive Hope cites to the 2020 *Silver State* proceeding, in which Bureau staff determined that a cancelled station's frequency was not available for section 74.1233(a)(1)(i)(A)(2) purposes during the appeal process.[29] In the Opposition, Family responds that the Commission is not bound by the Bureau's reasoning in *Silver State*, that *Silver State* was wrongly decided, and that the two cases are distinguishable on the facts.[30] Family also relies on the general proposition that non-hearing decisions taken pursuant to delegated authority are effective unless stayed

[21] Application for Review at 7 (citing *Translator Interference Order*, 34 FCC Rcd at 3482, para. 49 ("Applications or complaints that have not been acted upon as of the effective date of the rules adopted in this *Report and Order* will be decided based on the new rules.")).

[22] *Id*. (citing *Emmanuel Communications, Inc.*, Memorandum Opinion and Order, 34 FCC Rcd 9294 (2019) (*Emmanuel*)).

[23] Opposition at 8-9.

[24] *Id*. at 9-10.

[25] 47 CFR § 73.3566(a) ("Applications which are determined to be patently not in accordance with the FCC rules, regulations, or other requirements, unless accompanied by an appropriate request for waiver, will be considered defective and will not be accepted for filing or if inadvertently accepted for filing will be dismissed.").

[26] Application for Review at 3 ("A winning bidder must FIRST tender an application acceptable for filing or seek a waiver of any regulatory hindrance to application acceptance.").

[27] *Id*. at 5; Reply at 3.

[28] Application for Review at 6-7.

[29] *Id*. at 5-6 (citing *Silver State*, Letter Decision, FCC File Nos. BLFT-20190415ABG *et al*. (MB June 29, 2020) (*Silver State Staff Letter*), *recon. dismissed in part and otherwise denied, Silver State Broadcasting, LLC*, Letter Decision, FCC File Nos. 93597 *et al.* (MB Oct. 16, 2020) (*Silver State Reconsideration Letter*); *Melody Music, Inc. v. FCC*, 345 F.2d 730 (D.C. Cir. 1965) (holding that the Commission acted arbitrarily and capriciously when it treated two similarly situated licensees differently without an adequate explanation for doing so)).

[30] Opposition at 6-8 (noting that *Silver State* involved a former licensee appealing the deletion of its own license and had filed a stay request "demonstrating its desire to preserve access to its former channel," in contrast to the DKRSA-LP licensee, who "has not objected to either the Translator Application or the KVIB-LP Modification Application").

(in this case, upon public notice of the cancellation).[31] In its Reply, Positive Hope argues that Family relies on case law that does not involve a cancelled license, as here.[32]

III. DISCUSSION

10. We dismiss one of the arguments made in the Application for Review on procedural grounds and, as a separate and independent ground for disposal, deny all of them. An application for review of a final action taken on delegated authority will be granted when, *inter alia*, such action: conflicts with statute, regulation, precedent or established Commission policy; involves application of a precedent or policy that should be overturned; or makes an erroneous finding as to an important or material factual question.[33] The Commission's Rules do not permit the grant of an application for review "if it relies on questions of fact or law upon which the designated authority has been afforded no opportunity to pass."[34]

11. *Timeliness of the Family Petition.* We dismiss and, as a separate and independent ground for disposal, deny Positive Hope's argument that the Family Petition was untimely filed under section 1.106(f) of the Rules.[35] Positive Hope did not present this argument to the Bureau. Therefore, we dismiss this argument on procedural grounds.[36] On the merits, we find that the Family Petition was timely filed. A petition for reconsideration must be filed within 30 days of public notice of the action taken, which in this case would be on or before September 6, 2019.[37] The applicable rule section for determining when Family filed the Petition is section 1.4(f), which states that electronically filed documents must be received by the electronic filing system before midnight on the filing date.[38] This "Filed Date" for the Family Petition is recorded in the Bureau's Consolidated Database System (CDBS) under "Legal Action Information" as September 6, 2019. The filing date is also reflected in CDBS as the "Amendment Received Date" for the simultaneously filed Amended Translator Application and again in the September 11, 2019, public notice announcing, "Engineering amendment filed 09/06/2019."[39] The "tendered date" data field displayed in CDBS under "Application Search Details" in this case was used for internal administrative processing of the application and, regardless, is irrelevant for section 1.106(f) purposes, as this data field relates only to the Amended Translator Application, not the Family Petition. In any event, as we note above, both documents were received in CDBS on September 6, 2019.

12. *Reinstatement.* We deny Positive Hope's argument that the Translator Application should not have been reinstated, although on different grounds than those set out in the *Reconsideration*

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[31] Opposition at 6 (citing the *Reconsideration Letter*, 35 FCC Rcd at 6468; 47 CFR § 1.102(b); *Committee to Save WEAM v. FCC,* 808 F.2d 113, 119 (D.C. Cir. 1986)).

[32] Reply at 4.

[33] 47 CFR § 1.115(b).

[34] 47 CFR § 1.115(c).

[35] To the extent that Positive Hope also challenges the timeliness of Family's filing of the Amended Translator Application, this issue is moot given our holding herein that Family was entitled to file a minor amendment under the Commission's liberal amendment policy for auction winners.

[36] 47 CFR § 1.115(c).

[37] 47 CFR § 1.106(f).

[38] 47 CFR §§ 1.4(f) and 73.3564(a) also refer to documents that are "tendered"—i.e., delivered—in person or by mail to the Commission. For electronically filed documents, the relevant time is when the document was received by the Commission's electronic filing system.

[39] *Broadcast Applications*, Public Notice, Report No. 29569 (MB Sept. 11, 2019) at 8. In the *Reconsideration Letter*, the Bureau correctly recited the date that the Family Petition was filed as September 6, 2019. However, it inconsistently recites the filing date of the Amended Translator Application as September 6, 2019, and September 9, 2019. *See Reconsideration Letter*, 35 FCC Rcd at 6465-66. The information in CDBS confirms that only the September 6, 2019, date is correct.

Letter. Specifically, we conclude that reinstatement in this case was necessary and appropriate to implement the Commission's liberal amendment policy regarding auction long-form applications in general, and Auction 100 applications specifically.[40] This policy provides that an auction long-form applicant may file an amendment to cure *any* defect, as long as the amendment does not constitute a major change to its originally proposed facilities.[41] The non-adjacent channel change proposed in the Amended Translator Application is classified as a minor change.[42] Under the Commission's liberal amendment policy, processing staff should have issued a deficiency letter and afforded Family an opportunity to correct the Translator Application rather than dismiss the application.[43] Had this procedure been followed, the Translator Application would have still been pending when the new rules took effect and thus would have been processed under those rules.[44] We reject Positive Hope's implication that any defective application that does not contain a waiver request cannot be subsequently reinstated. Rather, in these circumstances, we uphold the Bureau's reinstatement of the Amended Translator Application, but on the basis that it implements the Commission's liberal amendment policy for auction long-form applications.[45]

13. Despite Positive Hope's assertions, neither the *Translator Interference Order* nor the Commission's decision in *Emmanuel* militates against reinstatement in this case.[46] In *Emmanuel*, the applicant initially sought reconsideration of the dismissal of its defective long-form application by, *inter alia*, seeking a waiver rather than by proposing to cure the defect.[47] It was not until the application for review stage that the *Emmanuel* applicant filed an amendment purporting to address the defects in its application. The Commission declined to consider the amendment at that stage on the basis that it had not been filed within 30 days of the dismissal, as required by the Commission's *nunc pro tunc* policy.[48] In doing so, the Commission noted that the new requirements set out in the *Translator Interference Order* did not apply because Emmanuel's application had been acted upon before the new rules became effective.[49]

14. Here, we acknowledge the Bureau incorrectly dismissed the application without first issuing a deficiency letter and affording Family an opportunity to cure the defect. We rectify the

[40] *See Auction of Cross-Service FM Translator Construction Permit Closes—Winning Bidders Announced for Auction 100*, Public Notice, 34 FCC Rcd 5212, 5219, para. 37, n.42 (MB/OEA 2019) ("Although we expect applicants to provide complete and accurate information in all filings with the Commission, under our liberal amendment policy we will permit winning bidders to file amendments to their long-form applications including, as necessary, amendments to resolve site availability issues.").

[41] 47 CFR § 73.3522(a)(2)-(3) (stating that amendments to any long-form application filed by "a winning bidder or a non-mutually exclusive applicant for a new station . . . in all broadcast services subject to competitive bidding" may be filed to "cur[e] *any* defect, omission or inconsistency identified by the Commission, or to make minor modifications to the application, or pursuant to § 1.65") (emphasis added).

[42] 47 CFR § 74.1233(a)(1)(i)(A)(2); *see also* 47 CFR § 74.1233(d)(5)(iii).

[43] *See* 47 CFR § 73.3522(a)(2).

[44] *Translator Interference Order*, 34 FCC Rcd at 3484, para. 49.

[45] In view of our finding that reinstatement was proper based on the Commission's liberal amendment policy, it is unnecessary to address Positive Hope's arguments that Family did not qualify for *nunc pro tunc* treatment or that the Bureau otherwise misapplied that policy to the circumstances here.

[46] *Emmanuel*, 34 FCC Rcd at 9298, para. 10.

[47] *Emmanuel*, 34 FCC Rcd at 9295, para. 4; *see also Emmanuel Communications, Inc.*, Letter Decision, File No. BNPFT-20171220AAW (MB rel. Sept. 28, 2018).

[48] *Emmanuel*, 34 FCC Rcd at 9298, para. 10.

[49] *Id.* at 9298, para. 11. The Commission did not address the issue of whether an improperly dismissed long form applicant is entitled to reinstatement and an opportunity to amend, nor whether, in such circumstances, the applicant could seek a non-adjacent channel change under the new rules.

improper dismissal by returning Family to the position it would have been in if Bureau staff had issued a deficiency notice and provided an opportunity to file a curative amendment under the liberal amendment policy. Therefore, to prevent any undue prejudice from the improper dismissal, we treat the Amended Translator Application as pending and not yet acted upon prior to the effective date of the rules adopted in the *Translator Interference Order*, and thus as being subject to the new rules.[50]

15. *Eligibility for a non-adjacent channel change*. We find that Family was eligible to seek a non-adjacent channel change under section 74.1233(a)(1)(i)(A)(2) to eliminate potential interference to either XHTY or neighboring station KKLJ(FM), Julian, California (KKLJ).[51] First, we reject Positive Hope's contention that "the station proposed in [the] Translator Application cannot exist" because the dismissal of the Translator Application rendered the Translator facility a "nullity" incapable of causing interference as required by section 74.1233(a)(1)(i)(A)(2).[52] As noted above, the Bureau should not have dismissed the Translator Application but should have issued a deficiency notice and provided an opportunity to file a curative amendment. The Amended Translator Application, which we are allowing under the liberal amendment policy, is subject to the standard procedure governing non-adjacent channel changes, which are expressed in terms of predicted operations.[53] Specifically, as the Bureau explained in the *Reconsideration Decision*, "An unbuilt station, by necessity, must submit a showing of predicted rather than actual interference."[54] In this case, Family's channel change resolved or reduced interference to two stations: (1) the Mexican station, XHTY, by eliminating the spacing violation; and (2) KKLJ, by eliminating a sizable zone of potential interference within the contour overlap of the Translator's 25 dBu contour and KKLJ's 45 dBu contour.[55] No such zone of potential interference would be created with another broadcast station at the proposed frequency. Therefore, Family satisfies the section 74.1233(a)(1)(i)(A)(2) threshold requirement of reducing predicted interference.

16. We also deny Positive Hope's argument that the Bureau treated similarly situated parties dissimilarly by reinstating the Translator Application while, in the *Silver State* proceeding, dismissing a non-adjacent channel change translator modification application that also sought to move to a channel recently vacated as a result of a license cancellation. In *Silver State*, the translator station sought to move to a channel whose status was still in dispute whereas the Bureau authorized Family to move to a channel that was vacant. We clarify that translator stations seeking to cure interference by relocating to another channel may only move to a channel that is either uncontested or the subject of a final decision confirming its availability at the time the application is acted upon. In the *Translator Interference Order*, the Commission allowed non-adjacent channel changes in order to "help keep translators on the air and reduce the intensity of conflicts stemming from the fact that the translator's future operation is at stake."[56] This purpose would not be served by permitting channel changes to contested frequencies. Rather, granting non-adjacent channel changes prior to a final decision confirming the proposed channel's availability would encourage translator operators to attempt to remediate interference by relocating to channels that may not be viable, thus risking the translator being caught in a situation where it can neither return to its original channel (due to interference) nor construct on the new one (if an appeal results in the frequency being occupied by another station). This situation would contravene the Commission's clearly

[50] *See Translator Interference Order*, 34 FCC Rcd at 3482, para. 49.

[51] *Reconsideration Letter*, 35 FCC Rcd at 6467.

[52] Application for Review at 5, paras. 13-14.

[53] *See* 47 CFR § 74.1204(f); *Translator Interference Order*, 34 FCC Rcd at 3460, para 6 ("[W]e modify section 74.1233(a)(1) of the Commission's rules (Rules) to define an FM translator's change to any available same-band FM channel as a minor change, upon a showing of actual or ***predicted*** interference to or from any other broadcast station.") (emphasis added).

[54] *Reconsideration Letter*, 35 FCC Rcd at 6467.

[55] *Id*.

[56] *Translator Interference Order*, 34 FCC Rcd at 3460, para. 5.

expressed intent to prevent such proposals.[57] In addition, a translator seeking to remediate interference on its existing channel is often operating under a Commission-imposed deadline to resolve the interference. Relying on a channel whose availability is the subject of an ongoing proceeding would risk undermining the translator's ability to meet that deadline. For these reasons, we conclude that the Commission intended that a channel used to eliminate interference would be limited to a channel that is either uncontested or the subject of a final decision confirming its availability at the time the application is acted upon.[58]

17. Applying this analysis to the facts before us, we note that the DKRSA-LP cancellation became final on October 14, 2019,[59] and therefore Channel 266 was available after that date, both when the Bureau reinstated the Amended Translator Application as well as at the time of the grant of the application herein. The *Silver State* decision is entirely consistent with our analysis. In that situation, the Bureau determined that a channel was not available because the cancellation of the original licensee on that channel was still under appeal at the time the subject application was processed by the Bureau.[60] Although as a Bureau-level decision *Silver State* is not binding on the Commission, we hereby affirm the reasoning therein with respect to channel availability.[61]

18. Upon review of the Application for Review and the entire record, we conclude that Positive Hope has not demonstrated that the *Reconsideration Letter* conflicts with statute, regulation, precedent or established Commission policy, involves application of a precedent or policy that should be overturned, or contains an erroneous finding as to an important or material factual question.

IV. ORDERING CLAUSE

19. **ACCORDINGLY, IT IS ORDERED** that, pursuant to Section 5(c)(5) of the Communications Act of 1934, as amended,[62] and Section 1.115(g) of the Commission's Rules,[63] the Application for Review IS DISMISSED to the extent discussed herein and otherwise **IS DENIED**.

20. **IT IS FURTHER ORDERED** that the long-form application filed by Family Stations, Inc. on July 31, 2019, and amended on September 6, 2019 (Application File No. BNPFT-20190731AAZ), **IS GRANTED**.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

[57] *See Translator Interference Order*, 34 FCC Rcd at 3471, n.107 ("To prevent translator operators from filing modification applications for channels that are not viable," the Commission considers interference resolved only "when the translator is licensed on the new channel").

[58] *See WKVE, Semora, North Carolina*, Memorandum Opinion and Order and Notice of Apparent Liability, 18 FCC Rcd 23411, 23423 (2003) ("We will not take adverse action on [an application] based solely on its acceptability as filed, when subsequent events prior to staff review resulted in a fully acceptable application.").

[59] The DKRSA-LP cancellation became final on October 14, 2019, one month after public notice of the Bureau's disposal of the last petition for reconsideration challenging the cancellation. *See La Maestra Family Foundation*, Letter Decision, Ref. No. 1800B3-IB (MB Sept. 10, 2019); *Broadcast Applications*, Public Notice, Report No. 29571 (MB Sept. 13, 2019).

[60] *See Silver State Reconsideration Letter* at 4.

[61] *See Comcast Corp. v. FCC,* 526 F.3d 763, 769 (D.C. Cir. 2008).

[62] 47 U.S.C. § 155(c)(5).

[63] 47 CFR § 1.115(g).