

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

|                                 |   |                            |
|---------------------------------|---|----------------------------|
| In the Matter of                | ) |                            |
|                                 | ) |                            |
| CAPSTAR TX, LLC                 | ) | File No. BNPFT-20181102AAJ |
|                                 | ) |                            |
| For a New FM Translator Station | ) |                            |
| at Modesto, California          | ) |                            |
|                                 | ) |                            |

**MEMORANDUM OPINION AND ORDER**

**Adopted: September 22, 2022****Released: September 23, 2022**

By the Commission:

**I. INTRODUCTION**

1. In this Memorandum Opinion and Order, we deny the Application for Review filed by Justin Howze (Howze)<sup>1</sup> seeking reversal of the Media Bureau (Bureau) order dismissing his Petition for Reconsideration.<sup>2</sup> Howze challenges Capstar's application for a new FM translator station construction permit at Modesto, California.<sup>3</sup> We find that the Bureau properly dismissed the Reconsideration Petition. On review of the Bureau's denial of Howze's petition to deny, we reject Howze's claim that the Local Community Radio Act of 2010 (LCRA),<sup>4</sup> or unique procedures established to govern the prior FM Translator Auction 83, required the Bureau to mandate preclusion studies when licensing new FM translator stations in subsequent auctions.

**II. BACKGROUND**

2. Capstar filed its application for a new FM translator at Modesto as part of the Auction 100 filing window.<sup>5</sup> After a mutually exclusive competing application was withdrawn, Capstar filed its long-form (FCC Form 349) application,<sup>6</sup> and Howze timely filed a Petition to Deny the Application.<sup>7</sup> In

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<sup>1</sup> Application for Review of Justin Howze (Howze), File No. BNPFT-20181102AAJ (filed January 3, 2020). Capstar TX, LLC (Capstar) filed an Opposition to Application for Review (Opposition) on January 29, 2020 (after filing an unopposed Request for Extension of Time to File Opposition on January 16, 2020), and Howze filed a Reply to Opposition to Application for Review (Reply) on February 11, 2020.

<sup>2</sup> Petition for Reconsideration of Howze, File No. BNPFT-20181102AAJ (filed August 19, 2019) (Reconsideration Petition).

<sup>3</sup> File No. BNPFT-20181102AAJ.

<sup>4</sup> Pub. L. 111-371, 124 Stat. 4072 (2011).

<sup>5</sup> See *Revitalization of the AM Radio Service*, First Report and Order, Further Notice of Proposed Rule Making, and Notice of Inquiry, 30 FCC Rcd 12145, 12152-54, paras. 15-17 (2015) (*AMR First R&O*) (announcing two 2016 FM translator modification filing windows for AM stations, to be followed by two 2017 auction filing windows for new cross-service FM translators (designated as Auction 99 and Auction 100), available to AM licensees and permittees that did not participate in 2016 modification windows).

<sup>6</sup> The long form application was filed on November 2, 2018, and placed on public notice thereafter. See *Broadcast Applications*, Public Notice, Report No. 29358 (MB Nov. 7, 2018).

<sup>7</sup> See 47 CFR § 73.5006(b). Capstar filed an Opposition to Petition to Deny (Petition Opposition) on December 4, 2018, with Howze filing a Reply to Opposition (Petition Reply) on December 9, 2018. Capstar amended the

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it, Howze asserted that grant of the application would violate Section 5 of the LCRA (Section 5), which requires the Commission to ensure that licensing opportunities are available for all secondary services,<sup>8</sup> that its licensing decisions are made based on the needs of the local community, and that all secondary services remain equal in status and secondary to full-service FM stations. Howze claimed that Section 5 required the Commission in Auctions 99 and 100 to use the same procedures it previously adopted in 2012 for Auction 83 FM translator applications. Howze argued the Commission's decision in Auction 83 to limit the number of translator applications per licensee, and to require applicant-filed preclusion studies demonstrating that spectrum remained for future LPFM applicants, applied to all future windows involving FM translator and LPFM stations.<sup>9</sup> In the *Staff Decision*, the Bureau denied the Petition to Deny, holding that nothing in the language of Section 5 of the LCRA mandates that the Commission adopt the specific Auction 83 processing measures for other processing windows. The Bureau further discussed why the Auction 99 and 100 procedures were in full compliance with Section 5.<sup>10</sup>

3. Howze timely filed the Reconsideration Petition. In dismissing it,<sup>11</sup> the Bureau found that the Reconsideration Petition did not comport with the requirements of section 1.106(c) of our rules, as the Reconsideration Petition merely repeated arguments from the Petition to Deny.<sup>12</sup> The Bureau also found that even if it were to consider Howze's argument that evaluation of the Capstar Modesto application must use Auction 83 preclusion studies, it would conclude that the application satisfies those standards, and it would have denied the Reconsideration Petition on that basis. Specifically, the Bureau observed that Capstar's voluntarily produced technical study demonstrated that grant of the Capstar translator application would not eliminate all LPFM licensing opportunities in the Modesto market, leaving at least five available LPFM channels in that market that would have satisfied the requirements for Auction 83 preclusion studies.<sup>13</sup> Howze timely filed the instant Application for Review, asserting that the Bureau's dismissal was procedurally and substantively flawed.<sup>14</sup>

### III. DISCUSSION

4. We affirm the Bureau's dismissal of Howze's Reconsideration Petition on procedural grounds, deny Howze's objections to the Bureau's dismissal, and uphold the Bureau's initial *Staff Decision* that nothing in the LCRA required the Commission to apply Auction 83 procedures to Auction 99 or 100.<sup>15</sup> We further find that the Auction 83 procedures that Howze seeks to apply here were initiated to deal with the unprecedented number of applications filed in that window, and the need to prevent the unique circumstances of that window from depleting spectrum for future LPFM and other secondary

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Application on June 26, 2019, to reflect the reorganized Capstar TX, LLC, that emerged from bankruptcy proceedings. The Bureau concluded that Howze had standing as a resident of the area in which Capstar's proposed new translator could be heard. *Mr. Justin Howze and Marissa Repp, Esq.*, Letter Decision, 34 FCC Rcd 6187, 6189 & n.19 (MB 2019) (*Staff Decision*).

<sup>8</sup> "Secondary services" include FM translators, FM boosters, and Low Power FM (LPFM) stations.

<sup>9</sup> Petition to Deny, filed by Howze November 19, 2018, at 2-4.

<sup>10</sup> *Staff Decision*, 34 FCC Rcd at 6191-93.

<sup>11</sup> *Mr. Justin Howze and Marissa Repp, Esq.*, Letter Decision, 34 FCC Rcd 11153 (MB 2019) (*Reconsideration Decision*).

<sup>12</sup> *Id.*, 34 FCC Rcd at 11153-54.

<sup>13</sup> *Id.*, 34 FCC Rcd at 11154; Opposition to Reconsideration Petition, filed by Capstar September 4, 2019, at 14 (citing *Media Bureau Offers Examples to Clarify Auction 83 FM Translator Application Selections and Cap Showings Requirements*, Public Notice, 28 FCC Rcd 98 (MB 2013)).

<sup>14</sup> Application for Review at 2.

<sup>15</sup> See *Staff Decision*, *supra* note 7.

service licensing. Auction 100, in which Capstar applied for the Modesto translator, utilized a different set of procedures to limit the number of applications that also complied with Section 5 of the LCRA.

5. *Procedural arguments.* We affirm the Bureau's dismissal of the Reconsideration Petition because it failed to identify any material error, omission, or reason warranting reconsideration and instead relied on arguments that had been fully considered and rejected by the Bureau in denying the Petition to Deny.<sup>16</sup> Mere disagreement with the Bureau's findings does not provide a valid basis for reconsideration.<sup>17</sup>

6. In support of his procedural argument, Howze asserts that the case of *WWIZ, Inc.*, is no longer valid law, and seems to create a "doctrine of infallibility."<sup>18</sup> We disagree. *WWIZ* has not been invalidated and is, in fact, applicable to this matter. That case stands for the proposition that "rehearing will not be granted merely for the purpose of again debating matters on which the tribunal has once deliberated and spoken."<sup>19</sup> A petitioner that does not receive the result that it favors, and that has not presented newly discovered facts or arguments that would warrant reconsideration by the designated authority, has as its remedy an application for review to the full Commission, which will take a fresh look at its facts and arguments to determine whether the designated authority has decided properly. Because Howze presented no new facts or arguments, the Bureau correctly dismissed the Reconsideration Petition. Accordingly, we affirm the Bureau's decision and deny the procedural objections in Howze's Application for Review.<sup>20</sup>

7. *Substantive Arguments.* We also affirm the Bureau's decision to grant the Capstar application and find that the Bureau's processing procedures for Auctions 99 and 100 were consistent with the LCRA.<sup>21</sup> Howze asserts that the Bureau did not adequately explain why the Auction 99 and 100

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<sup>16</sup> 47 CFR § 1.106(p)(1), (3). *See Amendment of Certain of the Commission's Part 1 Rules of Practice and Procedure and Part 0 Rules of Commission Organization*, Report and Order, 26 FCC Rcd 1594, 1606, para. 27 (2011) (adopting 47 CFR § 1.106(p) and deciding that "[f]or a similarly procedurally defective or repetitive petition directed to a bureau or office (rather than the full Commission) seeking reconsideration of a staff-level decision, we delegate authority to the relevant bureau or office to dismiss or deny the petition").

<sup>17</sup> *WWIZ, Inc.*, Memorandum Opinion and Order, 37 FCC 685, 686 (1964) (finding that reconsideration will not be granted for the purpose of debating matters on which the Commission has deliberated and spoken), *aff'd sub nom. Lorain Journal Co. v. FCC*, 351 F. 2d 824 (D.C. Cir. 1965), *cert. denied*, 383 U.S. 967 (1966) (*WWIZ*).

<sup>18</sup> Application for Review at 5-6.

<sup>19</sup> *WWIZ*, 37 FCC at 686, para. 2. Contrary to Howze's assertion, the Commission continues to rely on this principle and the case in which it was stated. *See, e.g., Immaculate Conception Apostolic School*, Order on Reconsideration, 32 FCC Rcd 2684, 2685 n.8 (2017) ("no basis for reconsideration" when applicant sought reconsideration based only on restatement of "its unsupported prior contention, rejected by the Commission") (citing *WWIZ*).

<sup>20</sup> In any event, our decision to affirm the Bureau's decision to grant the application on the merits renders this procedural issue moot.

<sup>21</sup> Howze, in the Application for Review, incorporates by reference the Reconsideration Petition and all responsive pleadings, in order to "provide the Commission with the analysis it needs to do what is required . . ." Application for Review at 8. We dismiss the Application for Review to the extent it seeks to incorporate by reference arguments that Howze made in previously filed pleadings. *WGBH Educational Foundation*, Memorandum Opinion and Order, 30 FCC Rcd 7703, 7704, para. 3 n.7 (2015) (explaining that the Commission's rules require the entity filing an Application for Review to set forth fully its arguments and all underlying relevant facts "with particularity" in the Application for Review) (quoting 47 CFR § 1.115(b)(2)(i); citing *Tama Radio Licenses of Tampa, FL, Inc.*, Memorandum Opinion and Order, 25 FCC Rcd 7588, 7589 (2010), *aff'd sub nom. Cherry v. FCC*, 641 F.3d 494 (D.C. Cir. 2011); *Red Hot Radio, Inc.*, Memorandum Opinion and Order, 19 FCC Rcd 6737, 6745 n.63 (2004)). *See also NTCH, Inc. v. FCC*, 950 F.3d 871, 885 (D.C. Cir. 2020) (upholding dismissal of application for review for failure to comply with procedural requirements). On alternative and independent grounds, we address those arguments on the merits, along with those raised specifically in the Application for Review, and affirm the Bureau's decision to grant the application for the reasons discussed herein.

procedures departed from a “clear, broadly applicable policy statement”<sup>22</sup> in the Commission’s Fourth Report and Order in *Creation of a Low Power Radio Service*,<sup>23</sup> that the Commission’s primary focus under Section 5 is to ensure that FM translator licensing procedures do not foreclose or unduly limit future LPFM licensing.<sup>24</sup> We do not agree that the procedures adopted for Auctions 99 and 100 represent a departure from that statement of policy. In designing the Auction 99 and 100 window procedures, the Commission adopted various measures to control the total number of new cross-service translators awarded, consistent with the spectrum goals of Section 5 and the Commission’s policies concerning the LPFM service.<sup>25</sup>

8. As noted above, Section 5 requires the Commission to ensure, when licensing new FM translators, boosters, or LPFM stations, that: (1) licenses are available to FM translator stations, LPFM stations, and FM booster stations; (2) licensing decisions are made based on the needs of the local community; and (3) FM translator stations, LPFM stations, and FM booster stations remain equal in status and secondary to existing and modified full-service FM stations.<sup>26</sup> Prior to passage of the LCRA, the Commission had already begun to implement special processing procedures for Auction 83 applications—specifically a ten-application national cap—based on a number of factors, the first being “the sheer volume of Auction No. 83 filings, when compared to historic translator and LPFM licensing levels.”<sup>27</sup> In the *LPFM Fourth R&O*, the Commission modified its Auction 83 processing proposals to conform to the since-enacted LCRA.<sup>28</sup> Based on the volume of translator applications filed in the general Auction 83 window—in excess of 13,000 applications—the Commission adopted extraordinary remedial measures, including limiting the number of filed applications that applicants could continue to prosecute, and requiring applicant-filed preclusion studies to demonstrate market-by-market availability of LPFM channels, all to preserve spectrum for future LPFM stations.<sup>29</sup>

9. Howze asserts that the Auction 83 procedures must be used in all subsequent secondary service filing windows, even absent the unique circumstances and public interest considerations underlying Auction 83.<sup>30</sup> We disagree. The specific Auction 83 processing measures were uniquely

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<sup>22</sup> Reply at 8, para. 23. *See also* Application for Review at 6-7.

<sup>23</sup> *Creation of a Low Power Radio Service*, Fourth Report and Order and Third Order on Reconsideration, 27 FCC Rcd 3364 (*LPFM Fourth R&O*), clarified, Fifth Order on Reconsideration and Sixth Report and Order, 27 FCC Rcd 15402 (2012) (*LPFM Sixth R&O*). *See* Reply at 8.

<sup>24</sup> Reply at 8; *LPFM Fourth R&O*, 27 FCC Rcd at 3373, para. 19 (“We also adopt our tentative conclusion that our primary focus under Section 5 must be to ensure that translator licensing procedures do not foreclose or unduly limit future LPFM licensing, because the more flexible translator licensing standards will make it much easier to license new translator stations in spectrum-limited markets than new LPFM stations.”).

<sup>25</sup> *Staff Decision*, 34 FCC Rcd at 6191-93.

<sup>26</sup> *See supra* note 4.

<sup>27</sup> *Creation of a Low Power Radio Service*, Third Further Notice of Proposed Rule Making, 26 FCC Rcd 9986, 9987, paras. 3-4 (2011). The other factors listed were “(2) evidence of precluded or diminished LPFM filing opportunities in many communities; (3) licensing asymmetries between these two services that make it unlikely that LPFM filings will materially affect future translator licensing opportunities, whereas translator filings could materially impact the far more limited opportunities for LPFM licenses; and (4) the fact that the next LPFM window may provide the last meaningful opportunity to expand the LPFM service in spectrum-congested areas.” *Id.* at 9987-88, para. 4.

<sup>28</sup> *See generally LPFM Fourth R&O*, 27 FCC Rcd 3376-88, paras. 28-49.

<sup>29</sup> *See generally LPFM Fourth R&O*, 27 FCC Rcd at 3382-88, paras. 38-49; *LPFM Sixth R&O*, 27 FCC Rcd at 15404-07, paras. 4-13 (discussing need for application caps).

<sup>30</sup> Reconsideration Petition at 10-16, incorporated by reference as Attachment 1 to Application for Review.

applicable to that auction and the Commission complied with the requirements in Section 5 of the LCRA in developing the procedures for Auctions 99 and 100, as further discussed below.<sup>31</sup>

10. In initiating the *AM Revitalization* proceeding, the Commission recognized the prevalence of local programming provided by AM stations.<sup>32</sup> The Commission stressed that “AM radio remains an important source of broadcast entertainment and information programming, particularly for locally oriented content,” providing “unique, community-based programming.”<sup>33</sup> Thus, the Commission’s decision to revitalize the AM broadcast band generally, and to license in Auctions 99 and 100 additional cross-service translators tied to AM stations specifically, was grounded in its consideration of local community needs, fulfilling Section 5(2) of the LCRA.<sup>34</sup>

11. Consistent with Section 5(1) of the LCRA, the Commission designed its *AM Revitalization* proceeding and the Auction 99 and 100 procedures to ensure continued licensing opportunities for all secondary services. The *AM Revitalization* proceeding contemplated a filing window during which AM station licensees could apply for a fill-in cross-service FM translator, with a cap of one translator per AM station. In adopting this proposal, the Commission rejected the idea of a broader FM translator window, open to applicants of all services, concluding that the goal of revitalizing the AM band necessitated a focused window limited to applicants for cross-service translators to rebroadcast AM stations.<sup>35</sup> The Commission further limited this proposed relief to one new cross-service translator per AM station, with each such translator permanently linked to the AM primary station that it rebroadcast.<sup>36</sup> The Commission specifically sought comment as to the effect of such a window on other services,

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<sup>31</sup> While Howze claims that the Commission did not cite any references to the LCRA in the *AMR* proceeding, see Howze Reply to Opposition to Petition for Reconsideration at 4-5, 18, the Commission in fact specifically sought comment in the *AMR Notice of Proposed Rulemaking* on how an FM translator window would impact LPFM, including “licensing opportunities” for LPFM stations. *Revitalization of the AM Radio Service*, Notice of Proposed Rule Making, 28 FCC Rcd 15221, 15228-29, paras. 17-18 (2013) (*AMR NPRM*). Based on the record in response to these inquiries, the Commission adopted rules and procedures that complied with the requirements of Section 5 of the LCRA. See *infra*, paras. 10-16.

<sup>32</sup> *AMR NPRM*, 28 FCC Rcd at 15222, para. 3. The proceeding sought to address the “significant technological, policy, and economic changes that have occurred in AM broadcasting” since its last major set of AM rule changes more than two decades previously.

<sup>33</sup> *Id.* The Commission further emphasized “discussions of local news, politics and public affairs, traffic announcements, and coverage of community events such as high school athletic contests.” *Id.* See also *AMR First R&O*, 30 FCC Rcd at 12146-47, para. 3, and at 12150, para. 11.

<sup>34</sup> We also affirm the Bureau’s holding that language in the *LPFM Fourth R&O* does not exclusively limit FM translator licensing to rural areas, leaving LPFM stations alone to serve urban areas. Howze argued that the Commission noted that the more limited coverage area of an LPFM station was better suited to urban areas, while the wider coverage of FM translators makes them more useful in rural areas, and thus that the needs of a local community such as Modesto can only be met by an LPFM station. See Petition to Deny at 3; Reconsideration Petition at 3-4 (citing *LPFM Fourth R&O*, 27 FCC Rcd at 3372, para. 18). As the Bureau noted in the *Staff Decision*, however, the Commission’s observation does not effectively segregate FM translator stations to rural areas. We affirm the Bureau’s statement that “the fact that an LPFM station’s limited coverage area makes the station more effective in an urban area is not the same as saying that *only* LPFM stations may be licensed in urban areas. LPFM stations have in fact been licensed at smaller communities in rural areas, and likewise FM translators have proved effective in more densely populated urbanized areas.” *Staff Decision*, 34 FCC Rcd at 6188 n.7 (emphasis in original).

<sup>35</sup> *AMR NPRM*, 28 FCC Rcd at 15226-27, paras. 13-14; *AMR First R&O*, 30 FCC Rcd 12153-54, para. 17.

<sup>36</sup> In other words, such a translator could not be assigned or transferred except in conjunction with the AM primary station that licensed it. *AMR NPRM*, 28 FCC Rcd at 15227, para. 14; *AMR First R&O*, 30 FCC Rcd at 12154, para. 17.

including the LPFM service,<sup>37</sup> noting that “a narrowly tailored filing window for such FM translators . . . could yield significant public interest benefits with little to no detriment either to the FM translator service or to licensing opportunities for LPFM stations, especially since the filing window proposed here will follow the 2013 LPFM filing window.”<sup>38</sup>

12. The Commission, despite general record support for the proposed one-to-an-AM station filing window,<sup>39</sup> further modified this cross-service window in a way that would reduce the number of new FM translator opportunities, consistent with Section 5(1) of the LCRA. It ordered, first, two filing windows for AM licensees wishing to purchase and substantially modify existing FM translators to use as cross-service translators, followed by two auction windows for new cross-service FM translators.<sup>40</sup> The Commission further limited participation in the new translator windows—Auctions 99 and 100—to those AM station licensees that had not already participated in a modification window.<sup>41</sup> This restriction thus reduced the number of new translator applications that could be filed, as many AM broadcasters opted to modify and relocate an existing FM translator rather than apply for a new one. Thus, the procedures adopted for Auctions 99 and 100, like those adopted following the Auction 83 filing window, were designed to strike a balance between the stated goals of the rulemaking proceeding, the procedures adopted therein,<sup>42</sup> and the overall goal of preserving spectrum for secondary services.

13. While Howze argues that Section 5 requires a market-by-market evaluation of secondary spectrum availability, and prohibits further award of FM translator construction permits in markets where translators outnumber LPFM stations,<sup>43</sup> we reiterate that the LCRA does not mandate such specific measures.<sup>44</sup> As noted in the *LPFM Fourth R&O*, “[i]n its broadest terms, Section 5(1) clearly requires the

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<sup>37</sup> *AMR NPRM*, 28 FCC Rcd at 15228, para. 17.

<sup>38</sup> *Id.* at 15229, para. 18.

<sup>39</sup> See *AMR First R&O*, 30 FCC Rcd at 12149-50, para. 10. Although at least one commenter raised the issue of LCRA compliance, along with other proposals to safeguard LPFM licensing (see Comments of Common Frequency, Inc., filed in MB Docket No. 13-249 (Jan. 6, 2014)), no commenter specifically advocated for the detailed applicant showings and other procedures used in Auction 83.

<sup>40</sup> *AMR First R&O*, 30 FCC Rcd at 12152-54, paras. 15-17.

<sup>41</sup> *Id.* at 12153, para. 17.

<sup>42</sup> The adopted procedures resulted in grant of 1,741 new cross-service translators, far fewer than the 4,633 AM stations eligible to apply by the end of the Auction 100 filing window. *Broadcast Station Totals as of March 31, 2018*, News Release (Apr. 9, 2018). We note that, in the *Staff Decision*, the Bureau erroneously estimated that no more than 1,707 translator permits would be awarded from Auctions 99 and 100. *Staff Decision*, 34 FCC Rcd at 6192.

<sup>43</sup> Petition to Deny at 4.

<sup>44</sup> We further reject Howze’s assertion that Auction 83 procedures have been used outside the Auction 83 context, thus demonstrating that they must be used for other secondary service filing windows. Specifically, Howze states that Auction 83-style preclusion studies are also required for consideration of so-called “Mattoon Waivers.” See Reconsideration Petition at 15-16 (citing *John F. Garziglia, Esq.*, Letter, 26 FCC Rcd 12685 (MB 2011) (*Mattoon*)). A Mattoon Waiver waives certain restrictions on FM translator relocations upon a four-factor showing, including a showing that the move is not in an LPFM spectrum-limited market. As noted in the *Reconsideration Decision*, 34 FCC Rcd at 11154 n.6, preclusion studies are neither required nor even mentioned in *Mattoon* or any subsequent decision, including that cited by Howze, *Educational Media Foundation*, Memorandum Opinion and Order, 29 FCC Rcd 15051 (2014). Moreover, the Commission recently explained that Mattoon is a “Bureau-level waiver decision [and] of little precedential value outside the facts presented in it and subsequent, similar waiver cases,” and it disavowed “any attempt to apply Mattoon outside the context of physical relocation of translator stations.” *Amendment of Part 74 of the Commission’s Rules Regarding FM Translator Interference*, Order on Reconsideration, 35 FCC Rcd 11561, 11563, para. 6 (2020). The Commission further observed that “[a]lthough the Commission endorsed the Bureau’s continued use of *Mattoon* waivers in a 2015 proceeding, the Commission did not address any concern about future LPFM licensing opportunities or the use of preclusion studies in its directive

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Commission to ensure that some minimum number of FM translator and LPFM ‘licenses are available’ throughout the nation when licensing FM translator and LPFM stations.’’<sup>45</sup> There is no market-by-market mandate in Section 5, only a requirement that licensing opportunities generally must be preserved; and there is no requirement that secondary services remain equal in number, only equal in status, per Section 5(3).

14. Although the Commission determined that extraordinary procedural measures were necessary when winnowing the over 13,000 applications filed in the Auction 83 window,<sup>46</sup> as discussed above, Auctions 99 and 100 presented a different public interest calculus than Auction 83. Because LPFM stations originate programming, rather than rebroadcasting FM or, in this case, AM full-service stations, LPFM stations could not be utilized to address issues facing the AM service. This does not mean that the Commission denigrated the LPFM service vis-à-vis FM translators, contrary to Section 5(3).<sup>47</sup> Rather, given a particular problem—the difficulties facing the AM broadcast service—and the fact that local community needs dictated that it find solutions to that problem, the Commission properly concluded that LPFM stations were not part of that solution. In other words, although both services were and remain equal in status, they were not equally efficacious in revitalizing the AM service.

15. In sum, we find that the Auction 99 and 100 procedures were in full compliance with Section 5’s dictates. In satisfaction of the first prong, Applications were capped at one per AM station, and further capped by forcing applicants to choose between modifying an existing translator or applying for a new one, thus ensuring that new translators awarded through these windows would not consume all available spectrum. Additionally, the Auction 99 and 100 windows were scheduled to open after the 2013 LPFM filing window,<sup>48</sup> affording LPFM applicants prior access to available spectrum. In satisfaction of the second prong, the Commission found that AM stations provide uniquely local service in many instances, the needs of local communities were considered, and such communities will benefit by expanding AM service through use of FM translators by allowing service in dayparts that local AM stations cannot currently provide, with better signal quality. In satisfaction of the third prong, nothing in the Auction 99 or 100 procedures elevates new cross-service FM translators to higher status than LPFM stations, and in fact the transferability restrictions on these new translators afford them less flexibility than previously authorized FM translators and LPFM stations.<sup>49</sup>

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for the Bureau’s future work in this area.” *Id.* at 11563 n.19 (citing *AMR First R&O*, 30 FCC Rcd at 12151, para. 13). Thus, we affirm the Bureau’s holding that *Mattoon* and cases following it do not mandate the use of Auction 83 procedures in future FM translator auctions.

<sup>45</sup> *LPFM Fourth R&O*, 27 FCC Rcd at 3371-72, para. 16.

<sup>46</sup> As a result of the conditions placed on Auction 83 applicants, 5,450 new translator permits were awarded, out of a theoretical maximum of 13,377, or 40.7 percent. This paved the way for the October-November 2013 LPFM filing window (see, e.g., *Media Bureau Announces Availability of the Revised FCC Form 318 and the Filing Procedures for October 15 – October 29, 2013, Low Power FM Filing Window*, Public Notice, 28 FCC Rcd 8854 (MB 2013)), in which 1,994 out of a total of 2,827 new LPFM station applications filed (70.5 percent) were granted.

<sup>47</sup> LCRA Section 5(3) requires that the Commission ensure “that FM translator stations, LPFM stations, and FM booster stations remain equal in status and secondary to existing and modified full-service FM stations.”

<sup>48</sup> See *supra* note 39.

<sup>49</sup> We reject Howze’s characterization of the transferability limitations as “merely reiterat[ing] the anti-trafficking sentiment” of 47 U.S.C. § 309(j)(4)(E). Reconsideration Petition at 14. Section 309(j)(4)(E) of the Act instructs the Commission, in prescribing auction procedures and licensing auctioned facilities, to design such regulations as are necessary to prevent unjust enrichment. It does not prohibit the assignment of auctioned stations. See, e.g., 47 CFR § 73.5007(c), which requires repayment of all or a portion of an auction bidding credit when assigning an auctioned facility under certain circumstances. Other FM translators obtained through competitive bidding, including those awarded in Auction 83, have no bars to transferability. Contrary to Howze’s assertion, the Auction 99 and 100 application procedures, including the unique limitation on assigning translators obtained through those auction

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16. The Commission is presented over time with unique situations and public interest assessments. The solution to one situation may be totally inadequate for a different set of circumstances. This is what occurred here: the procedures established to address the problem of processing over 13,000 FM translator applications filed in Auction 83, while preserving sufficient LPFM licensing opportunities, was not the correct solution to the problem of assisting AM stations to continue serving their communities. Thus, while Howze contends that Auctions 99 and 100 should have been conducted differently, we find that the Commission correctly evaluated the public interest on the facts presented to it, including considering all the factors required by Section 5 of the LCRA, and implemented a set of procedures in keeping with that evaluation. We therefore affirm the Bureau's denial of Howze's petition to deny in the *Staff Decision* and the *Reconsideration Decision*.<sup>50</sup>

#### IV. ORDERING CLAUSE

17. For the foregoing reasons, Justin Howze's Application for Review **IS DISMISSED IN PART AND OTHERWISE DENIED**.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch  
Secretary

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windows, were proposed and adopted by the Commission to "provide immediate benefits to the AM service without materially affecting future FM translator window applicants," and to "yield significant public interest benefits with little to no detriment either to the FM translator service or to licensing opportunities for LPFM stations." *AMR NPRM*, 28 FCC Rcd at 15228-29, paras. 16, 18.

<sup>50</sup> On alternative and independent grounds, we deny Howze's Application for Review because, even if we were to evaluate the Capstar Modesto application based on an Auction 83 preclusion study, we would conclude that the application satisfies those standards. Although it was under no obligation to do so, Capstar voluntarily submitted a technical study in its Opposition to the Reconsideration Petition demonstrating that grant of its translator application would *not* eliminate all LPFM licensing opportunities in the Modesto market. See *Reconsideration Decision*, 34 FCC Rcd at 11154-55; Capstar Opposition to Reconsideration Petition at 18-27. The Bureau engineering staff concurred with Capstar that upon grant of the translator application, at least five available LPFM channels would remain in the Modesto market, which would have satisfied the requirements for Auction 83 preclusion studies. *Id.* at 11155. While Howze found what he termed various practical difficulties with these channels (for example, where they would have to be built, or that they would receive interference from existing co-channel stations—see Reply to Opposition to Petition for Reconsideration, filed by Howze Sept. 10, 2019, at 12-17.), the Bureau correctly stated that neither the LCRA nor our Auction 83 procedures require that we address potential site restrictions or conduct interference studies when providing filing opportunities for another secondary service. *Reconsideration Decision*, 34 FCC Rcd at 11155. Potential received interference, for example, is not unusual for a secondary service station, and does not render the channel unavailable. We therefore affirm the *Staff Decision* and the *Reconsideration Decision* on alternative and independent grounds.