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OCT 30 2013

Federal Communications Commission
Office of the Secretary

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of)

Application of WGBH Educational Foundation)

For Minor Change in Licensed Facilities)
of License WCAI8566)

File No. BPED-20130809ABZ

OPPOSITION TO PETITION FOR RECONSIDERATION

WGBH Educational Foundation ("WGBH"), licensee of non-commercial educational FM radio station WCAI, Woods Hole, Massachusetts ("WCAI" or "the Station"), hereby submits this Opposition to the Petition for Reconsideration filed in this proceeding by Cape Cod Regional Technical High School on behalf of WCCT ("WCCT"),¹ pursuant to Section 1.106 of the Commission's rules.² WCCT has failed to establish its standing to file a petition for reconsideration because it has not adequately explained why it could not have participated in the underlying proceeding prior to the Media Bureau's grant of WCAI's application. On the merits, WCCT's Petition simply readopts the arguments WCCT made in its original Informal Objection.³ As WGBH explained in its Opposition to the Objection,⁴ the grant of WCAI's construction-permit application was both proper and in the public interest, contrary to WCCT's

¹ Petition for Reconsideration, File No. BPED-20130809ABZ (filed Oct. 18, 2013) ("Petition").

² 47 C.F.R. § 1.106. WCCT served its Petition on WGBH by mail, making this Opposition timely as per Sections 1.4(h) and 1.106(g) of the Rules.

³ See Petition at 6; Informal Objection, File No. BPED-20130809ABZ (filed Sept. 13, 2013) ("Objection").

⁴ Opposition to Informal Objection, File No. BPED-20130809ABZ (filed Oct. 18, 2013) ("WGBH Opp. to Objection"). A copy of WGBH's Opposition to WCCT's Informal Objection is attached to this Opposition as Exhibit A.

unfounded accusation that the WGBH has been “warehousing” spectrum.⁵ Neither WCCT’s original Objection nor its new Petition acknowledges the uncontroverted evidence in the record of WGBH’s diligent efforts and substantial investment in bringing WCAI’s modified facilities — which WGBH expects to be operational by the end of the year — to the verge of completion. Nor can WCCT show that the public interest would be better served by preventing WCAI from expanding listener access to WCAI’s local programming while WCCT — which primarily rebroadcasts the programming of Boston-based WBUR-FM — “evaluat[es] this opportunity” for proposing a service expansion at some unspecified point in the future.⁶ For the reasons stated herein and in WGBH’s Opposition to the Informal Objection, the Media Bureau should dismiss or deny the Petition.

I. WCCT Has No Standing to Seek Reconsideration Because It Has Not Justified Its Failure to File a Timely Informal Objection.

A party has no standing to file a petition for reconsideration unless it either was a party in the earlier proceeding or else can “show good reason why it was not possible for [the petitioner] to participate in the earlier stages of the proceeding.”⁷ WCCT asserts that it has standing as a participant in the underlying proceeding based on its Informal Objection, even though — contrary to the rule governing informal objections — WCCT failed to file its Objection “[b]efore FCC action” on WCAI’s application.⁸ In fact, WCCT filed its Objection on the same day on which the Media Bureau granted WCAI’s application, which was the thirtieth

⁵ See WGBH Opp. to Objection, at 4-5.

⁶ See Petition at 4.

⁷ 47 C.F.R. § 1.106(b)(1).

⁸ See 47 C.F.R. § 73.3587.

day after the Commission gave public notice that WCAI's application had been accepted for filing.⁹

The Commission has made clear that, “[w]hile Section 73.3587 of the Rules does not contain a filing deadline for informal objections, it specifically states that informal objections must be filed before Commission action on the application.”¹⁰ In *Siga Broadcasting*, the Media Bureau noted that the Commission “has afforded reconsideration to petitioners where the grant of an application occurred shortly after the application was filed,” but “in each of those cases, the time period between the filing of the application and the grant was less than a week.”¹¹ In contrast, the Media Bureau granted WCAI's application 30 days after accepting WCAI's application for filing via Public Notice.

WCCT misreads *Siga Broadcasting* as establishing that “filing an objection within 30 days is sufficient to preserve standing for seeking reconsideration,”¹² based on that decision's statement that late objectors clearly do not have standing “where the grant of an application has occurred over 30 days from the filing of the application.”¹³ In essence, WCCT argues that the Commission has effectively established a guaranteed 30-day window in which parties may file informal objections, similar to the guaranteed 30-day filing periods provided for

⁹ See *Broadcast Applications*, Public Notice, Report No. 28052, at 11 (dated Aug. 14, 2013) (noting acceptance for filing of WCAI's minor-change application); *Broadcast Actions*, Public Notice, Report. No. 48076, at 3 (dated Sept. 18, 2013) (showing grant of WCAI minor-change application as of Sept. 13, 2013); *Broadcast Applications*, Public Notice, Report. No. 28081, at 6 (dated Sept. 25, 2013) (“Informal Objection Filed 09/13/2013 by Cape Cod Regional Technical High School[.] This public notice corrects public notice dated 9/18/2013[sic], report number 48076[sic] to reflect the correct name of the Objector.”).

¹⁰ *Siga Broad. Corp.*, Letter, 23 FCC Rcd 1823, 1824 (MB 2008).

¹¹ *Id.*

¹² Petition at 5.

¹³ *Siga*, 23 FCC Rcd at 1824.

objections to various types of more formal applications.¹⁴ No such guaranteed filing window for informal objections exists. Rather, the Commission has stated that it will “accord[] standing to petitioners for reconsideration who failed to file pre-grant objections when prompt staff action ‘effectively precludes participation during the initial consideration of an application’ — such as when an application is granted four or five days after Public Notice of its acceptance.”¹⁵ In contrast, in *Association for Community Education* the Commission refused to grant standing to seek reconsideration based on a post-grant informal objection when 31 days passed between Public Notice of the underlying application and grant of the application.¹⁶ Nothing in the Commission’s decision suggested that the outcome would have been different if only 30 days had passed. Unlike pleadings that have fixed filing deadlines, the measure of whether a post-grant informal objection is sufficiently timely to grant the objector standing to seek reconsideration is whether the initial consideration period was so short that potential objectors were “effectively preclude[d]” from participating.¹⁷

In sum, the Commission has never established a *per se* rule that a 30-day period between Public Notice of an application and the application’s grant “effectively precludes [objectors’] participation during the initial consideration of an application.” Nor has WCCT offered any evidence that in this case it was effectively precluded from objecting to WCAI’s

¹⁴ Petition at 5 n.20.

¹⁵ *Association for Community Education*, Memorandum Opinion and Order, 19 FCC Rcd 12682, 12684 (2004) (citing *Aspen FM, Inc.*, 12 FCC Rcd 17852, 17854 (1997), and *Ted and Jana Tucker*, 4 FCC Rcd 2816 (1989)).

¹⁶ *Id.*

¹⁷ *Id.* See also *Siga*, 23 FCC Rcd at 1824 (“The Commission has afforded reconsideration to petitioners where the grant of an application occurred shortly after the application was filed. In these instances, the Commission found that an expedient grant of the applications had not allowed sufficient time for potential objections to be filed, and thus, that it was in the public interest to allow those parties to file petitions for reconsideration.”) (footnote omitted).

application before the Commission acted on it, as required by Section 73.3587 of the Rules. It therefore was WCCT's burden, in any petition for reconsideration, to "show good reason why it was not possible for [the petitioner] to participate in the earlier stages of the proceeding."¹⁸ The Petition makes no such showing and therefore must be dismissed.

II. The Grant of WCAI's Application Was Proper and in the Public Interest.

Even if WCCT had standing to seek reconsideration, the Petition would fail on its merits. As WCCT concedes, nothing in the Commission's rules prevented WGBH from surrendering WCAI's existing permit and seeking a new one.¹⁹ As explained in WGBH's Opposition to the Informal Objection, WGBH's new application clearly explained the history underlying its request and provided ample evidence that WGBH was "'ready, willing, and able' to construct and operate [WCAI's modified facilities] as proposed."²⁰ The modified facilities — which WGBH expects to be operational by the end of the year — will give more listeners access to WCAI's locally focused programming. WCCT's unfounded accusation that WGBH seeks to "freeze the spectral landscape" and "warehouse spectrum"²¹ fails even to address the substantial investments and concrete steps WGBH has undertaken to bring the modified WCAI facilities to the verge of completion. Certainly, WCCT offers no evidence that the public interest would be better served by abandoning WCAI's nearly completed facility while requiring local listeners to

¹⁸ 47 C.F.R. § 1.106(b)(1).

¹⁹ See Objection at 5 (arguing that the FCC "disfavors what is effectively a surrender-and-reapply approach" but conceding such requests are "not directly forbidden by its rules").

²⁰ See WGBH Opp. to Objection, at 4-5 (quoting *Pathfinder Communications Corp.*, 18 FCC Rcd 9272, 9279 (2003)).

²¹ See Objection at 5, 7.

wait for WCCT to “evaluat[e] this opportunity” for potentially proposing a service expansion at some unspecified point in the future.²²

* * *

For the reasons discussed above and in WGBH’s Opposition to the Informal Objection, the Media Bureau should dismiss or deny the Petition. Even if it had standing to seek reconsideration — which it does not — WCCT has provided no basis for questioning that the grant of WCAI’s construction-permit application was both proper and in the public interest.

Respectfully submitted,



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Counsel to WGBH Educational Foundation

October 30, 2013

²² See Petition at 4.

Exhibit A

Before the
FEDERAL COMMUNICATIONS COMMISSION
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In the Matter of)	
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Application of WGBH Educational Foundation)	File No. BPED-20130809ABZ
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For Minor Change in Licensed Facilities)	ACCEPTED/FILED
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OCT 18 2013

OPPOSITION TO INFORMAL OBJECTION

Federal Communications Commission
Office of the Secretary

WGBH Educational Foundation ("WGBH"), licensee of non-commercial

educational FM radio station WCAI, Woods Hole, Massachusetts ("WCAI" or "the Station"), hereby submits this Opposition to the Informal Objection filed in this proceeding by Cape Cod Regional Technical High School on behalf of WCCT ("WCCT"),¹ pursuant to Section 73.3587 of the Commission's rules.² Contrary to WCCT's Objection, the grant of WCAI's construction-permit application was both proper and in the public interest. Notably, while WCCT accuses

¹ Informal Objection, File No. BPED-20130809ABZ (filed Sept. 13, 2013) ("*Objection*").

² 47 C.F.R. § 73.3587. WGBH notes that, although the Commission's Consolidated Database System suggests the Commission may have treated WCCT's informal objection as a petition for reconsideration, none of the relevant Public Notices in this proceeding reflects such a determination. *See Broadcast Actions*, Public Notice, Report. No. 48076, at 3 (dated Sept. 18, 2013) (showing grant of WCAI minor-change application as of Sept. 13, 2013); *Broadcast Applications*, Public Notice, Report. No. 28078, at 7 (dated Sept. 20, 2013) (erroneously noting "Informal Objection Filed 09/13/2013 by WGBH Educational Foundation"); *Broadcast Applications*, Public Notice, Report. No. 28081, at 6 (dated Sept. 25, 2013) ("Informal Objection Filed 09/13/2013 by Cape Cod Regional Technical High School[.] This public notice corrects public notice dated 9/18/2013[sic], report number 48076[sic] to reflect the correct name of the Objector."). If WCCT's filing were a petition for reconsideration, it would be defective for failing to explain why WCCT had not participated at earlier stages of the proceeding. *See* 47 C.F.R. § 1.106(b)(1). Finally, should the Commission nonetheless determine it may properly convert WCCT's informal objection — *sua sponte* and without formal public notice — to a petition for reconsideration, WGBH respectfully requests a waiver, to the extent required, of the opposition deadline set forth at 47 C.F.R. § 1.106(g).

WGBH of “warehousing” spectrum,³ it fails to acknowledge the uncontroverted evidence in the record of WGBH’s diligent efforts and substantial investment in bringing WCAI’s modified facilities into service. The fact that WCCT has “discuss[ed]” and “explor[ed]” speculative strategies for potentially seeking modifications to its own facility⁴ is no reason to prevent WCAI from implementing the modifications the Commission approved, particularly now that those modifications are on the verge of completion.

I. Background.

WGBH first sought approval to operate WCAI at increased power in October 2009, which approval was granted by the Commission in January 2010.⁵ As WGBH explained in its *Original Application*, the proposed modification would provide first or second NCE-FM service to more than 22,000 people.⁶ WGBH’s ability to begin construction was delayed by litigation instituted in the Massachusetts courts in August 2011 challenging the zoning approval WGBH obtained to construct a new structure for WCAI’s larger transmitter.⁷ Accordingly, the Commission tolled the construction permit from July 3, 2012, until February 15, 2013, with six months and two days remaining on the permit.⁸ Although the permit was tolled, WGBH pressed forward during this period in its efforts to expand WCAI’s service as soon as possible. Ultimately, WGBH was able to make alternate arrangements allowing the construction of

³ See *Objection* at 6.

⁴ See *Objection* at 6.

⁵ See File No. BPED-20091027ABU (granted Jan. 5, 2010) (“*Original Application*”).

⁶ *Original Application*, Engineering Exhibit at 2.

⁷ See Letter from Matthew S. DelNero and Eve R. Pogoriler, Counsel to WGBH Educational Foundation, to Marlene H. Dortch, Secretary, FCC (filed Aug. 3, 2012).

⁸ See E-mail from Irene Bleiweiss, FCC, to Matthew S. DelNero and Eve R. Pogoriler, Counsel to WGBH Educational Foundation (Aug. 15, 2012).

WCAI's new facilities to move forward without waiting for the Massachusetts litigation to resolve. WGBH therefore informed the Commission on February 14, 2013, that no further tolling of WCAI's construction permit would be required.⁹ The permit accordingly was set to expire on August 17, 2013.

As WGBH explained in surrendering the permit granted by the *Original Application*, however, WGBH experienced additional unexpected delays in completing WCAI's construction, largely attributable to the unique logistical challenges involved in transporting equipment and coordinating vendors' operations during the busy summer season on Martha's Vineyard.¹⁰ Construction was further complicated by the need to coordinate a power line upgrade with Comcast, the building's new landlord and owner, which was implementing upgrades of its own. Despite these complications, by August 31, 2013 WGBH had spent more than \$380,000 on equipment and related services and had completed nearly all the tasks necessary to complete construction under the original permit, including obtaining all the major equipment components, beginning the necessary electrical work, and signing leases for the transmitter tower and antenna space. Nonetheless, WGBH determined it would not be able to complete all remaining tasks by August 17.¹¹ Therefore, WGBH surrendered WCAI's existing construction permit and requested that the Commission grant WCAI a new construction permit.

⁹ See Letter from Matthew S. DelNero and Michael P. Beder, Counsel to WGBH Educational Foundation, to Marlene H. Dortch, Secretary, FCC (filed Feb. 14, 2013).

¹⁰ See File No. BPED-20130809ABZ, at Exhibit "Surrender of Construction Permit" (filed Aug. 12, 2013) ("*New Application*").

¹¹ *Id.*

II. The Grant of WCAI's Application Was Proper and in the Public Interest.

As WCCT concedes, nothing in the Commission's rules prevented WGBH from surrendering WCAI's existing permit and seeking a new one.¹² Rather, WCCT argues that such a process, although permissible under the rules, should be treated as an "end-run" around the rules setting a three-year limit on construction permits and narrowly limiting the circumstances under which permits may be tolled.¹³ This argument illustrates a fundamental misunderstanding of WGBH's request. WCCT mistakenly argues that WGBH's request was no different from seeking an extension of time on the original permit or seeking to toll that permit.¹⁴ In surrendering WCAI's original permit and seeking a new one, WGBH did not seek relief, as would have been the case in a request for tolling a construction permit.¹⁵ Nor, contrary to WCCT's implication, did WGBH assert that it would be entitled to additional time simply on the basis of having received a modified construction permit.¹⁶

Instead, WGBH surrendered its original permit. WGBH's new application clearly explained the history underlying its request, including some of the challenges it had faced in completing construction under WCAI's original permit. In seeking a new permit, WGBH was required to demonstrate anew that it stood "'ready, willing, and able' to construct and operate

¹² See *Objection* at 5 (arguing that the FCC "disfavors what is effectively a surrender-and-reapply approach" but conceding such requests are "not directly forbidden by its rules").

¹³ See *Objection* at 3 (citing 47 C.F.R. § 73.3598(a), (e), and 1998 *Biennial Regulatory Review — Streamlining of Mass Media Applications, Rules and Processes; Policies and Rules Regarding Minority and Female Ownership of Mass Media Facilities*, Report and Order, 13 FCC Rcd 23056 ¶ 83 (1998) ("*Streamlining Order*").

¹⁴ *Objection* at 5.

¹⁵ See 47 C.F.R. § 73.3598(b) ("The period of construction for an original construction permit *shall toll* when construction is prevented by the following causes not under the control of the permittee ...") (emphasis added).

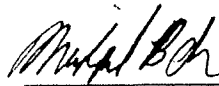
¹⁶ See *Objection* at 6 (citing 47 C.F.R. § 73.3533(b)).

[WCAI's modified facilities] as proposed."¹⁷ WGBH provided ample evidence to support that finding and the Commission's decision to grant WCAI a new construction permit. WCCT's unfounded accusation that WGBH seeks to "freeze the spectral landscape" and "warehouse spectrum"¹⁸ fails even to address the substantial investments and concrete steps WGBH has undertaken to bring the modified WCAI facilities to the verge of completion. Certainly, WCCT's *Objection* offers no evidence that the public interest would be better served by abandoning WCAI's nearly completed facility — which WGBH expects to be operational by the end of the year — while requiring local listeners to wait for WCCT to "explor[e] a strategy" for proposing a service expansion at some unspecified point in the future.¹⁹

* * *

For the reasons discussed above, the Informal Objection filed by WCCT provides no basis for questioning that the grant of WCAI's construction-permit application was both proper and in the public interest.

Respectfully submitted,



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October 18, 2013

¹⁷ See *Pathfinder Communications Corp.*, 18 FCC Rcd 9272, 9279 (2003).

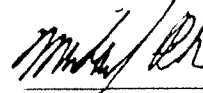
¹⁸ See *Objection* at 5, 7.

¹⁹ *Objection* at 6.

CERTIFICATE OF SERVICE

I, Michael Beder, an associate with the law firm of Covington & Burling LLP, certify that on this 18th day of October, 2013, I caused copies of the foregoing "Opposition to Informal Objection" to be served by certified U.S. mail, return receipt requested, on the following:

Cape Cod Regional Technical High School, WCCT
351 Pleasant Lake Ave.
Harwich, MA 02645

A handwritten signature in black ink, appearing to read "Michael Beder", written over a horizontal line.

Michael Beder

CERTIFICATE OF SERVICE

I, Michael Beder, an associate with the law firm of Covington & Burling LLP, certify that on this 30th day of October, 2013, I caused copies of the foregoing "Opposition to Petition for Reconsideration" to be served by certified U.S. mail, return receipt requested, on the following:

Cape Cod Regional Technical High School, WCCT
351 Pleasant Lake Ave.
Harwich, MA 02645

A handwritten signature in black ink, appearing to read "Michael Beder", is written over a horizontal line.

Michael Beder