



Federal Communications Commission
Washington, D.C. 20554

February 24, 2015

In Reply Refer To:
1800B3-ATS

Ms. Racine Freeman
Max Out Foundation
112 Westbrook Drive
Springfield, IL 62702

Gary S. Smithwick, Esq.
Smithwick & Belendiuk, P.C.
5028 Wisconsin Avenue, N.W., Suite 301
Washington, DC 20016

In re: Max Out Foundation
New-LP, Springfield, Illinois
Facility ID Number: 192659
File Number: BNPL-20131114BQA

**Petition to Deny, Petition for
Reconsideration, and Request for
Stay**

Dear Ms. Freeman and Counsel:

We have before us: 1) the Petition to Deny ("October Petition") filed by Saga Communications of Illinois, LLC ("Saga"), against the application of Max Out Foundation ("Max Out") for a new LPFM station at Springfield, Illinois ("Application"); 2) the Petition for Reconsideration ("November Petition") filed by Saga, seeking review of the Media Bureau ("Bureau") grant¹ of the Application; and 3) a Request for Stay of the grant of the Application filed by Saga.² For the reasons set forth below, we grant the November Petition in part, deny the October Petition, deny the November Petition in all other respects, and dismiss the Request for Stay as moot.

Background. Max Out filed the Application during the 2013 LPFM filing window, proposing to serve Springfield, Illinois, on Channel 239. The Bureau determined that the Application and the application filed by Benedictine University ("BU Application") were mutually exclusive and identified them as LPFM MX Group 155.³ On September 5, 2014, the Commission identified the BU Application as the tentative selectee of LPFM MX Group 155 and began a 90-day period in which both applicants could file major change amendments in order to resolve their mutual exclusivities.⁴

¹ See *Broadcast Actions*, Public Notice, Report No 48349 (MB Oct. 21, 2014).

² Saga filed the October Petition on October 14, 2014. Max Out filed an Opposition on October 31, 2014. Saga filed a Reply to the Opposition, the November Petition, and the Request for Stay on November 13, 2014. Max Out did not file an opposition to either the Petition for Reconsideration or the Request for Stay.

³ *Media Bureau Identifies Mutually Exclusive Applications Filed in the LPFM Window and Announces 60-Day Settlement Period; CDBS Is Now Accepting Form 318 Amendments*, Public Notice, 28 FCC Rcd 16713 (MB 2013).

⁴ *Commission Identifies Tentative Selectees in 111 Groups of Mutually Exclusive Applications Filed in the LPFM Window; Announces a 30-Day Petition to Deny Period and a 90-Day Period to File Voluntary Time-Share Proposals and Major Change Amendments*, Public Notice, 29 FCC Rcd 10847 (2014).

On September 8, 2014, Max Out amended the Application to propose operation on Channel 272 (“Amendment”). The Amendment included a second-adjacent channel waiver request with regard to Station WLFZ, Springfield, Illinois, which is licensed to Saga.⁵ The Bureau accepted the Application for filing on September 9, 2014, and gave public notice on September 12, 2014, starting a 30-day period in which file petitions to deny the Application.⁶

Saga timely filed the October Petition on October 14, 2014, requesting that the Commission deny the Application. Saga argues that the Waiver Request is defective because it relies on an incorrect antenna height.⁷ Saga further states that its engineer, Paul D. Figge, visited the site identified in the Application and did not observe a tower.⁸ Saga argues that because a new tower will be constructed, an environmental assessment would be required, which Max Out certified was not required.⁹ Accordingly, Saga suggests that Max Out has falsely certified a material fact to the Commission.¹⁰

The Bureau – unaware of the filing of the Petition to Deny - granted the Application on October 26, 2014.¹¹ Subsequently, Max Out filed the Opposition, in which it argues that Saga’s Engineering Statement is erroneous because Figge visited the wrong site.¹² Specifically, Max Out notes that Figge visited a site at the intersection of “Milton and Converse,” while its actual site is at the intersection of Milton Avenue and Carpenter Street.¹³ Max Out further argues that the Petition should be denied because it does not demonstrate that any listeners of WLFZ would receive interference from its proposed station.¹⁴ Finally, Max Out notes that the Commission does not require construction of antennas on existing towers.¹⁵

⁵ Amendment at Attachment 11 (“Waiver Request”).

⁶ See *Broadcast Applications*, Public Notice, Report No. 28323 (MB Sep. 12, 2014). 30 days from September 12, 2014, would have been October 12, 2014, which was a Sunday. The next day, October 13, 2014, the Commission was closed in observance of Columbus Day. Thus, any petition to deny would have been due on October 14, 2014. See 47 C.F.R. § 1.4(e)(1) (“The term holiday means Saturday, Sunday, officially recognized Federal legal holidays and any other day on which the Commission’s Headquarters are closed and not reopened prior to 5:30 p.m.”); 47 C.F.R. § 1.4(j) (“Unless otherwise provided . . . if, after making all the computations provided for in this section, the filing date falls on a holiday, the document shall be filed on the next business day.”).

⁷ October Petition at 2-3. Specifically, Saga notes that the Application proposes a 3-meter long antenna mounted on a tower that is 16.5 meters high above ground level (“AGL”) with a center of radiation at 15.5 meters AGL. Thus, the antenna would protrude on top of the tower or have to be lowered, which would affect the calculated interference area in the Waiver Request.

⁸ *Id.* at 3. In the attached Engineering Statement, Figge states that he visited the site at “the corner of Milton and Converse in Springfield, Illinois.” See *id.* at Attachment 2. The Engineering Statement further states that Waiver Request is defective because it assumed that the second story of a neighboring residential building was at 3 meters height instead of 4 meters height.

⁹ *Id.* at 3. See also Application Section VI, Question 10 (“The applicant certifies, based on its completion of Worksheets 2 and 3 and its review of the instructions to this application, that the proposed facility is excluded from environmental processing under 47 C.F.R. Section 1.1306 . . .”).

¹⁰ *Id.* at 3.

¹¹ The staff has determined that Saga’s paper-filed October petition, though timely received by the Commission’s mail room on October 14, 2014, was not forwarded to the Bureau until after the grant of the Application.

¹² Opposition at 1.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

In the Reply, Saga states that Figge did in fact visit the correct site, but identified it incorrectly in the October Petition.¹⁶ Saga reiterates that the Application should be denied because: 1) Max Out miscalculated in its Waiver Request the height of a neighboring building; 2) the antenna cannot be mounted on the tower as proposed in the Waiver Request; and 3) Max Out allegedly falsely certified in the Application that the proposed facility was excluded from environmental processing.¹⁷

In the November Petition, Saga argues that the Bureau erred in granting the Application without addressing the October Petition.¹⁸ In the Request for Stay, Saga asks the Bureau to stay the grant of the Application pending a decision on the October Petition and November Petition.¹⁹

Discussion. The Commission will consider a petition for reconsideration only when the petitioner shows either a material error in the Commission's original order, or raises additional facts, not known or existing at the time of the petitioner's last opportunity to present such matters.²⁰ We grant the November Petition to the extent that the staff erroneously granted the Application without considering the October Petition.

We find that Max Out has submitted an adequate second adjacent waiver request showing in the Application and that Saga has failed to demonstrate that the Waiver Request is defective. The use of the U/D method of interference calculation employing the FCC F(50,50) and F(50,10) contour curves has been in use for many years to resolve second adjacent waiver requests for translator stations.²¹ Furthermore, per the provisions of the Local Community Radio Act, the Commission envisioned using this same U/D method while also allowing the use of additional alternate methods to demonstrate that the proposed LPFM operation will not result in interference.²² Saga has not demonstrated that any harmful interference would be received by any WLFZ listeners, and we find that the fact that the antenna and building height may vary by 1-meter (approximately 3 feet) to be inconsequential. Saga fails to provide any documentation of actual interference, only the claim disputing the proposed physical configuration of Max Out's installation which is currently un-built. Additionally, the construction of a new tower alone does not require an environmental assessment, and Saga has not shown any specific reason why such an assessment would be required here.²³ Therefore, we will deny the October Petition and the November Petition, and dismiss the Request for Stay as moot.

Finally, we remind Max Out and Saga that Section 73.807(e)(2)(ii) of the Rules provides that once the Commission has notified an LPFM licensee that was granted a second-adjacent channel waiver request pursuant to Section 73.807(e)(1) that its station is causing interference to the signal of a full-service FM station, the LPFM station "shall suspend operation immediately" and "shall not resume

¹⁶ Reply at 3.

¹⁷ *Id.* at 3-4.

¹⁸ November Petition at 2.

¹⁹ Request for Stay at 2.

²⁰ See 47 C.F.R. § 1.106(c), (d). See also *WWIZ, Inc.*, Memorandum Opinion and Order, 37 FCC 685, 686 (1964), *aff'd sub nom. Lorain Journal Co. v. FCC*, 351 F.2d 824 (D.C. Cir. 1965), *cert. denied*, 387 U.S. 967 (1966).

²¹ *Living Way Ministries, Inc.*, Memorandum Opinion and Order, 17 FCC Rcd 17054, 17056, ¶ 5 (2002), *recon. denied* 23 FCC Rcd 15070 (2008).

²² See *Creation of a Low Power Radio Service*, Sixth Order on Reconsideration, 28 FCC Rcd 14489, 14498 (2013).

²³ See 47 C.F.R. §§ 1.1306, 1.1307. Additionally, Worksheet #2 to FCC Form 318 provides under what circumstances an applicant may not certify "Yes" to Section VI, Question 10. Saga has not indicated that any of these circumstances are present here.

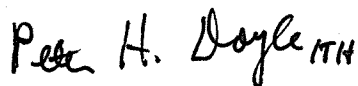
operation until such interference has been eliminated or it can demonstrate to the Commission that the interference was not due to emissions from the LPFM station.”²⁴ Accordingly, Max Out must ensure that the Station does not cause interference to any WLFZ listeners.

Conclusion. Accordingly, for the reasons set forth above, IT IS ORDERED that the Petition to Deny filed on October 14, 2014, by Saga Communications of Illinois, LLC, IS DENIED.

IT IS FURTHER ORDERED THAT the Petition for Reconsideration filed on November 13, 2014, by Saga Communications of Illinois, LLC, IS GRANTED to the extent indicated and IS DENIED in all other respects.

IT IS FURTHER ORDERED that the Request for Stay filed on November 13, 2014, by Saga Communications of Illinois IS DISMISSED AS MOOT.

Sincerely,

A handwritten signature in black ink that reads "Peter H. Doyle" followed by the initials "PH".

Peter H. Doyle
Chief, Audio Division
Media Bureau

²⁴ 47 C.F.R. § 73.807(e)(2)(ii).