

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

In the Matter of)	LPFM MX Group 2
)	
Calvary of Birmingham)	File No. BNPL-20131112ALD
)	Facility I.D. No. 193015
)	
The Church in Birmingham Corp.)	File No. BNPL-20131024ANR
)	Facility ID No. 193990
)	
Love Commandment Ministries)	File No. BNPL-20131112BVI
)	Facility ID No. 195074
)	
For New LPFM Stations at Birmingham, Alabama)	

MEMORANDUM OPINION AND ORDER

Adopted: May 6, 2016

Released: May 9, 2016

By the Commission:

1. The Commission has before it a January 21, 2016, Application for Review (AFR) filed by Kimtron, Inc. (Kimtron). Kimtron seeks review of a Media Bureau (Bureau) decision that affirmed the Bureau's denial of Kimtron's petitions to deny the above-referenced applications for new low power FM stations at Birmingham, Alabama, and affirmed the Bureau's grant of those applications along with the second-adjacent channel spacing waivers requested by the applicants.¹ For the reasons discussed below, we dismiss in part and otherwise deny the AFR.

2. In the AFR, Kimtron again asserts that the proposed LPFM stations will cause interference to the "sideband multicast operation" of its station, WDJC-FM, Birmingham, Alabama, and that the Bureau erred in granting the applicants' second-adjacent channel spacing waivers.² Specifically,

¹ *LPFM MX Group 2*, Letter, DA 15-1479 (rel. Dec. 22, 2015) (*Reconsideration Decision*). The Bureau also granted Kimtron's petition to deny a fourth application for a new low power FM station at Birmingham, Alabama, and dismissed that application. Kimtron does not challenge that portion of the *Reconsideration Decision*.

² AFR at 8 (arguing that the Bureau's decision is "internally inconsistent with its own finding that LPFM stations may cause no interference to any authorized primary station[']s digital operations" and "violates requirements in the rules and the Communications Act that an LPFM may not cause an interference to a primary station's authorized analog and digital operation"). Kimtron also restates its argument that the Bureau's decision "conflicts with statutes and full Commission orders that a waiver request must be given a 'hard look.'" AFR at 8. Because the Bureau did not address this argument, we briefly do so here. Kimtron appears to be referring to the general waiver standard set forth in Section 1.3 of the Commission's rules (Rules), 47 CFR § 1.3, and precedents related to application of that standard. The Bureau, however, appropriately examined and granted the waiver requests under the standard for waiver of the second-adjacent channel spacing requirements set forth in Section 3(b)(2)(A) of the Local Community Radio Act of 2010, Pub. L. No. 111-371, 124 Stat. 4072 (2011), and Section 73.807 of the Rules. 47 CFR § 73.807(e)(2). See, e.g., *Central Texas Communications, Inc.*, Memorandum Opinion and Order, 25 FCC Rcd 7644, 7648 para. 11 (2010)(discussing fact that two different waiver standards applied, a specific standard adopted by the Commission and the general waiver standard set forth in Section 1.3). Accordingly, because the Bureau found the waivers justified under this statutory waiver standard, the general standard set forth in Section 1.3 and the precedents related to that standard did not come into play.

Kimtron repeats its assertion that the Bureau erred in finding that protection of a full power FM station's digital signal is ensured by compliance with the interference protection obligations set forth in Section 73.807 of the Rules.³ Kimtron also reprises its argument that the Bureau should have treated the proposed LPFM facilities as "spectrally first adjacent" to WDJC-FM, despite the fact that the proposed LPFM facilities would operate on channels that are second-adjacent to WDJC-FM's authorized channel.⁴ Upon review of the AFR and the entire record, we conclude that Kimtron has failed to demonstrate that the Bureau erred in rejecting these arguments.⁵ We uphold the Bureau's findings for the reasons stated in the *Reconsideration Decision*.

3. Kimtron also revisits its argument that interference from the proposed LPFM facilities "will adversely affect" its compliance with Section 73.403 of the Rules.⁶ That section requires that a station's digital programming stream "must be at least comparable in sound quality" to its analog programming.⁷ When the Commission adopted this requirement, it stated:

We expect and intend that the fundamental use of [digital audio broadcasting] will be for the provision of free over-the-air radio service. We will, therefore, require radio stations to provide at least one free digital over-the-air audio broadcast service. Specifically, radio stations operating in a digital mode must provide one free digital audio programming service that is comparable to or better in audio quality than that of their current analog service. Such a baseline requirement mirrors the Commission's analogous requirement for digital television stations, and is based on the same underlying policy consideration that significant benefits from digital conversion should flow directly to the public.⁸

While the Bureau did not reach this argument because it found the applicants had demonstrated that the proposed LPFM stations adequately protected WDJC-FM's digital operations, we take this opportunity to clarify that the "comparable quality" requirement is not directed at a possible reduction in the audio quality of a station's digital signal due to interference. Rather, it is designed to ensure that a station's own choices related to digital audio broadcasting, *e.g.*, its bandwidth allocated to replicate its analog programming service, do not lead to a deterioration in the quality of service provided to the public.⁹ Accordingly, we reject Kimtron's argument that

³ AFR at 9-11 (characterizing as "inconsistent with stated Commission policy" the Bureau's finding that compliance with the analog protections in Section 73.807 is adequate to demonstrate protection of a station's digital signal) and 12-13 (arguing that it was arbitrary and capricious for the Bureau to find that analog protection standards will adequately protect the digital signal).

⁴ The LPFM applications proposed operation on either Channel 227 or Channel 231. WDJC-FM operates on Channel 229.

⁵ While the Bureau did not note this, we believe it worth pointing out that the engineering analyses submitted by Kimtron used analog protection standards to calculate "the field strength of the WDJC-FM digital carriers" at the sites of the proposed LPFM stations and "[t]he F(50, 10) 70.7 dBu contour[s]" of the proposed facilities. AFR at Attachments (including the Engineering Statements attached to each of Kimtron's petitions to deny the captioned applications, each of which cites Section 73.333, 47 CFR § 73.333, a technical rule related to analog operations).

⁶ AFR at 5-6.

⁷ 47 CFR § 74.303.

⁸ *Digital Audio Broadcasting Systems and Their Impact on the Terrestrial Radio Broadcast Service*, Second Report and Order, First Order on Reconsideration and Further Notice of Proposed Rulemaking, 21 FCC Rcd 10344, 10355 para. 28 (2007).

⁹ See *id.* at 10355 para. 29 (permitting broadcasters "to use their frequencies as the marketplace dictates) and 10353-54 paras. 23-25 (noting that, with digital audio broadcasting, it is possible for a station to devote only a portion of its allotted bandwidth to broadcasting to the public while devoting the remainder of the bandwidth to other uses or services).

operation of the LPFM stations would impact its ability to comply with Section 73.403. We note, though, that should WDJC-FM experience interference to either its analog or its digital signal as a result of the operation of any of the proposed LPFM stations, it may seek relief by lodging a complaint with the Commission under Section 73.807(e)(2).¹⁰

4. We likewise are unpersuaded by Kimtron's argument that the Bureau left "unresolved a substantial issue concerning how Kimtron's engineering analysis is materially incorrect as to the degree of interference which WDJC-FM's digital operation can expect from the proposed LPFM station or, how this level of interference (or any interference from a secondary LPFM station) is consistent with ... the Commission's policy statements that the LPFM station must protect digital operations."¹¹ The Bureau considered but rejected Kimtron's engineering analysis because that analysis used the first-adjacent channel desired/undesired signal strength ratio rather than the second-adjacent channel ratio. The Bureau considered Kimtron's public interest argument as well but found it unnecessary to address that argument given its finding that the applicants had demonstrated that the proposed LPFM facilities satisfied the interference protection requirements applicable to LPFM stations.

5. Finally, Kimtron observes that, if an application for an LPFM station includes a request for a second-adjacent channel waiver, the waiver request is noted in the public notice accepting the application for filing. Kimtron for the first time argues that this "signifies the unique nature of an LPFM channel spacing waiver, the greater potential for interference, and the Commission's concern and desire that the public must be made aware of such potential to provide a timely opportunity to raise concerns."¹² It speculates that "[w]ere it a foregone conclusion that an analog protection standard adequately resolves interference protection scenarios for all purposes, there would have been no logical basis to require special Public Notices announcing the waiver or to establish a case-by-case waiver standard in Section 73.807 of the rules in 2012."¹³ We dismiss these portions of the AFR as procedurally defective. Section 5(c)(5) of the Communications Act of 1934, as amended, and Section 1.115(c) of the Rules bar applications for review that rely "on questions of fact or law upon which the [designated authority issuing the decision] has been afforded no opportunity to pass."¹⁴

¹⁰ 47 CFR § 73.807(e)(2). Once the Commission receives a *bona fide* complaint of interference caused by a LPFM station operating pursuant to a second-adjacent channel waiver, it notifies the LPFM station. *Id.* Upon notification, the LPFM station must suspend operations. It cannot resume operations until it eliminates the interference or demonstrates that the interference was not due to its operations. *Id.* In its petitions to deny the captioned applications, at pages 3-4 of each such filing, Kimtron acknowledged this procedure and expressed its intention to "be at utmost vigilance for impermissible LPFM interference to WDJC-FM and bring every instance to the Commission's attention promptly as provided for in the Commission's rules."

¹¹ AFR at 11-12.

¹² AFR at 2.

¹³ AFR at 10.

¹⁴ See 47 U.S.C. § 155(c)(5); 47 CFR § 1.115(c).

6. ACCORDINGLY, IT IS ORDERED that, pursuant to Section 5(c)(5) of the Communications Act of 1934, as amended,¹⁵ and Sections 1.115(c) and (g) of the Commission's Rules,¹⁶ the Application for Review filed by Kimtron, Inc. on January 21, 2016, IS DISMISSED IN PART for the reasons stated above and otherwise IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

¹⁵ 47 U.S.C. § 155(c)(5).

¹⁶ 47 CFR. § 1.115(c) and (g).