

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

In the Matter of)	
)	
Application of Razorcake/Gorsky Press, Inc.)	File No. BNPL-20131114AXZ
For a New LPFM Station at Pasadena, California)	Facility ID No. 195577
)	

ORDER ON RECONSIDERATION

Adopted: August 16, 2017

Released: August 16, 2017

By the Chief, Media Bureau:

I. INTRODUCTION

1. In this Order on Reconsideration, we dismiss a Petition for Reconsideration (Petition) filed by Educational Media Foundation (EMF) on April 21, 2017. EMF seeks reconsideration of the Commission’s Memorandum Opinion and Order (Order) in this proceeding.¹ Therein, the Commission denied EMF’s Application for Review of a Media Bureau (Bureau) decision that granted the above-referenced application (Application) and the request for waiver which accompanied it.

II. BACKGROUND

2. EMF is the licensee of KYLA(FM), Fountain Valley, California, which is co-channel to the new low power FM (LPFM) station proposed in the Application. EMF objected to the Application, asserting the proposed LPFM station would cause interference to KYLA(FM) and thus did not satisfy the standard for waiver (second-adjacent waiver) of the second-adjacent channel minimum distance separation requirements² set forth in Section 3(b)(2)(A) of the Local Communication Radio Act of 2010 (LCRA). To reach this conclusion, EMF construed Section 3(b)(2)(A) to require an LPFM applicant seeking a second-adjacent waiver to demonstrate that its proposed LPFM station will not cause interference to any radio station, not just those stations operating on second-adjacent channels. The Bureau rejected EMF’s reading of Section 3(b)(2)(A), finding an LPFM applicant seeking a second-adjacent waiver need only demonstrate that its proposed LPFM station will not cause interference to radio stations operating on second-adjacent channels. The Commission subsequently upheld the Bureau’s decision, affirming its reading of Section 3(b)(2)(A) and rejecting EMF’s argument that the Bureau

¹ Razorcake/Gorsky Press, Inc., Memorandum Opinion and Order, 32 FCC Rcd 2697 (2017) (*Order*).

² Section 73.807 of the Commission’s rules (Rules) requires that LPFM stations be situated specific distances from other co-, first- and second-adjacent channel facilities. Section 3(b)(2)(A) of the Local Community Radio Act of 2010 (LCRA), Pub. L. No. 111-371, 124 Stat. 4072 (2011), permits the Commission to waive the second-adjacent channel spacing requirements if an LPFM applicant demonstrates that its proposed LPFM facilities “will not result in interference to any authorized radio service.” *See also* 47 CFR § 73.807(e)(1) (stating the Commission will entertain second-adjacent waiver requests and requiring that LPFM applicants requesting such waivers establish the proposed LPFM station’s “operations will not result in interference to any authorized radio service”).

should also have considered whether grant of the waiver request would serve the public interest. EMF now seeks reconsideration of the Commission's decision.³

III. DISCUSSION

3. Section 1.106(p) of the Rules provides that “[p]etitions for reconsideration of a Commission action that plainly do not warrant consideration by the Commission may be dismissed or denied by the relevant bureau(s) or office(s).”⁴ Petitions that do not warrant consideration include those that rely on “arguments that have been fully considered and rejected by the Commission within the same proceeding,”⁵ and those that rely on “facts or arguments which have not previously been presented to the Commission and which do not meet the requirements of [Section 1.106(b)(2)].”⁶ As we explain below, each of the facts and arguments set forth in the Petition falls into one of these two categories.

4. In the Petition, EMF reprises its argument that Section 3(b)(2)(A) of the LCRA requires an LPFM applicant seeking a second-adjacent waiver to demonstrate that the proposed LPFM station will not cause interference to any radio station, not just radio stations operating on second-adjacent channels.⁷ It also repeats EMF's claim that the Bureau should have considered whether grant of the waiver “would harm the public interest.”⁸ Both of these arguments were considered and rejected by the Commission in the Order.⁹ Accordingly, we will dismiss them. As the Commission has stated, reconsideration will not be granted for the purpose of debating matters on which it has deliberated and spoken.¹⁰

5. We also dismiss the remaining portions of the Petition, in which EMF presents new facts and arguments not previously presented to the Commission.¹¹ These facts and arguments could have been presented earlier but were not, and are therefore subject to dismissal under Sections 1.106(p)(2) and 1.106(b)(2) of the Rules.¹² While EMF argues that consideration of the Petition is proper under Section 1.106(b)(2),¹³ we disagree. Contrary to EMF's assertion,¹⁴ release of the Order does not “amount[] to a substantial change in circumstance.”¹⁵ Further, we find no merit to EMF's claim that the Order

³ Razorcake/Gorsky Press, Inc. and Prometheus Radio Project opposed the Petition on May 25, 2017; EMF filed a Reply to Opposition (Reply) on June 1, 2017.

⁴ 47 CFR § 1.106(p).

⁵ 47 CFR § 1.106(p)(3).

⁶ 47 CFR § 1.106(p)(2).

⁷ Petition at 3, 5-9.

⁸ *Id.* at 14-19.

⁹ *Order*, 32 FCC Rcd at 2698-702 paras. 4-10, 2702 para. 11.

¹⁰ *See, e.g., WWIZ, Inc.*, Memorandum Opinion and Order, 37 FCC 685, 686 (1964).

¹¹ These new facts and arguments concern whether the Commission should designate the proceeding “permit-but-disclose” under the Commission's *ex parte* rules; whether the Order is entitled to *Chevron* deference, and whether the legislative history of the LCRA supports EMF's interpretation of that statute's second-adjacent waiver provision. Petition at 9-12, 12-14, 19. *See also* Reply at 4, 8-9.

¹² 47 CFR §§ 1.106(b)(2), 1.106(p)(2). Section 1.106(b)(2) provides that petitions for reconsideration of the Commission's denial of an application for review will be entertained only if: (i) the petition relies on facts which relate to events which have occurred or circumstances which have changed since the last opportunity to present such matters, or (ii) the petition relies on facts unknown to petitioner until after his last opportunity to present such matters which could not, through the exercise of ordinary diligence, have been learned prior to such opportunity.

¹³ Petition at 5-6.

¹⁴ Petition at n. 4. *See also* Reply at 5-6.

¹⁵ *Bell South Corp.*, Memorandum Opinion and Order, 5 FCC Rcd 2827, 2827 para. 3 (1990) (*Bell South*). *See also Shaw Communications, Inc.*, Order on Reconsideration, 27 FCC Rcd 6995, 6996 para. 4 (2012) (*Shaw*) (stating that

(continued....)

“contain[s] justifications ... not present in the Letter Decision ..., arguments which could not have been known to EMF at the time it prepared its [Application for Review].”¹⁶ EMF’s argument is particularly unavailing given the fact that the Bureau previously disposed of the identical issues—in virtually identical language—in a published decision released ten months prior to the filing of the EMF Application for Review and the fact that EMF’s counsel represented the party advancing these same issues in that proceeding.¹⁷ In any event, because none of the arguments presented in the Petition are based on new or newly discovered facts, Section 1.106(b)(2) bars their introduction at this stage in this proceeding.¹⁸

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“the Commission’s rejection of a previously raised argument” does not satisfy the requirements of Section 1.106(b)(2), “since of necessity the Commission’s order in any case will have been released after the aggrieved party was last able to present its arguments in pleadings”; *M & M Communications, Inc.*, Memorandum Opinion and Order, 2 FCC Rcd 5100, 5100 para. 6 (CCB 1987) (“The Commission’s disposition in a Review Order, of arguments raised in an Application for Review, does not constitute ‘changed circumstances’ pursuant to Section 1.106(b)(2).”). Indeed, “[w]ere this not true, Section 1.106(b)(2) of the Commission’s Rules would be essentially meaningless. *Bell South*, 5 FCC Rcd at 2827 para. 3. See also *Shaw*, 27 FCC Rcd at 6996 para. 4 (noting that, to find rejection of a previously raised argument constituted a changed circumstance under Section 1.106(b)(2), “would be to hold that the Commission must entertain petitions for reconsideration of *all* its orders, casting it into a Möbius loop of orders and petitions for reconsideration that could never reach finality”) (italics in original).

¹⁶ Petition at n.4. See also Reply at 6. According to EMF, the Order for the first time discussed the fact that EMF’s reading of the LCRA would result in two different interference remediation regimes applicable to stations on third-adjacent channels and concluded that the Section 3(b)(2)(A) created a new waiver standard “wholly removed from decades of Commission waiver precedent.” *Id.* EMF, however, ignores the fact that the Bureau addressed these two issues in the Letter Order. See Letter Order at 4 (discussing the fact that EMF’s reading of the LCRA would result in two different interference remediation regimes applicable to stations on third-adjacent channels) and n.30 (explaining that the statutory waiver process under Section 3(b)(2)(A) of the LCRA was separate from general waiver process under Section 1.3 of the Rules).

¹⁷ See *Centro Cultural de Mexico en el Condado de Orange*, Letter Order, 30 FCC Rcd 7343 (2015), *review dismissed in part and denied in part*, 31 FCC Rcd 838 (2016).

¹⁸ *Lone Cypress Radio Associates, Inc.*, Memorandum Opinion and Order, 8 FCC Rcd 6635, 6635 para. 2 (1993) (finding petitioner had “no right to complain in its instant petition” about a particular issue “as it raised no such contention in its application for review and as its argument is not based on any subsequent change of circumstance or discovery of previously-unknown facts”); *F.E.M. Ray, Inc.*, Memorandum Opinion and Order, 7 FCC Rcd 4606, 4606 para. 8 (1992) (stating that arguments made for the first time in a petition for reconsideration of a Commission order denying an application for review were not only “untimely” but could not be “entertained this late in the proceeding because they do not rely upon facts relating to new or changed circumstances or on facts unknown to [petitioner] until after its last opportunity to present such matters”). See also *Cencom Cable Income Partners II, L.P.*, Memorandum Opinion and Order, 12 FCC Rcd 22295, 22297 para. 6 (1997) (finding that petitioner’s “arguments do not allege new or newly discovered facts or changed circumstances as required by § 1.106(b)(2)”). Accordingly, EMF’s arguments relating to *Chevron* deference, the legislative history of the LCRA and the *ex parte* status of this application proceeding are impermissibly raised for the first time in the Petition.

IV. CONCLUSION/ORDERING CLAUSE

6. For the reasons discussed above, we find that the Petition relies upon impermissible facts and arguments. ACCORDINGLY, IT IS ORDERED that the Petition for Reconsideration filed by Educational Media Foundation on April 21, 2017, IS DISMISSED pursuant to Section 1.106(p) of the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION

Michelle M. Carey
Chief, Media Bureau