



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

June 27, 2018

In Reply Refer to:
1800B3-SS

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**In re: New(FX), Tallassee, AL
Facility ID No. 201563**

File No. BNPFT-20171220ABH

Petition to Deny

Dear Counsel:

This letter concerns: (1) the referenced application (Application) of Michael Butler Broadcasting, LLC (MBB) for a construction permit for a new FM translator station on Channel 234 at Tallassee, Alabama;¹ (2) a Petition to Deny (Petition) the Application, filed on January 19, 2018, by Troy Broadcasting Corporation (Troy); and (3) related responsive pleadings.² For the reasons set forth below, we deny the Petition and grant the Application, as amended.

Background. MBB filed for a new FM Translator station at Tallassee during the filing window in July of 2017.³ MBB's proposal was determined to be a "singleton," and it was invited to file a long-

¹ The proposed translator is a fill-in for Station WTLS(AM), Tallassee, Alabama.

² MBB filed an Opposition to Petition to Deny (Opposition) on February 6, 2018, to which Troy replied on February 16, 2018 (Reply). MBB subsequently filed a Petition for Leave to File Response and a Response (Response) on February 28, 2018. We note that pleadings filed after the Reply are unauthorized pleadings and can be dismissed. See 47 C.F.R. § 1.45. See also, e.g., *Fourteen Hundred, Inc.*, Letter Order, 15 FCC Rcd 4486, 4488 (MB 2010) (declining to consider unauthorized pleadings). However, because the Response adds decisionally significant facts to the record here, we will consider it in the public interest. See *Kansas Public Telecommunications Services, Inc.*, Memorandum Opinion and Order and Notice of Apparent Liability, 14 FCC Rcd 12112, 12117, n.2 (MB 1999) (unauthorized pleadings may be considered if in the public interest).

³ See Application File No. BNPFT-20170731AJG; *Filing Instructions for Cross-Service FM Translator Auction Filing Window for AM Broadcasters to be Open July 26-August 2, 2017*, Public Notice, 32 FCC Rcd 4663 (MB/WTB 2017).

form application,⁴ which it did on December 20, 2017. The staff accepted the Application for filing on December 29, 2017.⁵ MBB filed an amendment on March 1, 2018, proposing a new transmitter site.⁶

In its Petition, Troy argues that MBB does not have permission or authority to use the tower specified in the Application and that MBB therefore lacks required reasonable assurance of site availability.⁷ Troy submits an email from tower owner Alexander Broadcasting, Co., LLC, to MBB, copying our staff, stating that MBB “does not have permission or authority from us to use our tower as . . . specified in their application.”⁸ Finally, Troy argues that MBB’s proposed translator will interfere with the established listening audience of WTBF-FM, Brundidge, Alabama, in violation of Section 74.1204(f) of the FCC’s rules (Rules) and that the Application should be dismissed.⁹

In its Opposition, MBB does not dispute its error in the Application specifying a transmitter site for which it had no reasonable assurance that the site was available for its use.¹⁰ MBB asserts, however, that, on March 1, 2018, it paper-filed a minor amendment to the Application designating a new transmitter site.¹¹ MBB argues that the amendment is permitted under Commission precedent.¹²

In its Reply, Troy argues that *Falletti* is inapplicable here because that case concerned full-power FM facilities and not FM translators providing fill-in service to AM stations.¹³ Troy also asserts that even if *Falletti* were applicable here, the Commission should rethink that decision because, *inter alia*, allowing applicants that never had any basis for specifying a particular transmitter site to amend to a new site after being challenged is a waste of the Commission’s resources.¹⁴ Finally, Troy argues that even if MBB is allowed to file its amendment, it is not grantable because the purportedly curative amendment is itself defective. Specifically, Troy claims that: (1) no Preparer’s Certification is included, as required; (2) there is no Antenna Structure Registration Number and that proposing an FM translator antenna that is “more than 78 meters high” must be in error; and (3) the maps attached to the amended application “do not match up” with any of the answers provided to Section III, Question 6 through 8 of the form.¹⁵

⁴ See *Media Bureau Announces Filing Window for Long-Form Applications*, Public Notice, 32 FCC Rcd 9248, 9265 (MB 2017).

⁵ See *Broadcast Actions*, Public Notice, Report No. 29145 (rel. Jan. 4, 2018).

⁶ See *Broadcast Applications*, Public Notice, Report No. 29185 (rel. Mar. 5, 2018).

⁷ Petition at 1-2.

⁸ See *id.* at Attachment.

⁹ *Id.* at 1, n.2; see also “Declaration of [Troy Secretary] Richard W. Gilchrist, Sr.,” and engineering submission of Anderson Associates at Attachment; see also 47 CFR § 74.1204(f).

¹⁰ Opposition at 1.

¹¹ *Id.* MBB notes that the amendment was paper-filed because CDBS at the time was not accepting electronic amendments to Long Form Auction 99 applications. *Id.* and at Attachment. Ultimately, MBB was able successfully to file the amendment to its Application through the Commission’s electronic filing system. See *Broadcast Applications*, Public Notice, Report No. 29185 (Mar. 5, 2018), p. 4 (Application amendment received).

¹² Opposition at 1-2, citing *Christopher Falletti*, 30 FCC Rcd 827 (2015) (*Falletti*).

¹³ Reply at 1.

¹⁴ Opposition at 3.

¹⁵ Reply at 4.

In its Response, MBB states that its paper-filed amendment had also been filed electronically and that any errors identified by Troy have been addressed.¹⁶ Next, MBB argues that the question of *Falletti* applying to FM translator cases was resolved in *Edward A. Schober*.¹⁷ In *Schober*, MBB asserts, the Commission found that lack of “reasonable assurance” did not result in the dismissal or denial of the subject FM translator application, which was subsequently granted.¹⁸ MBB also argues that if Troy wants the Commission to change its policy concerning the elimination of the “reasonable assurance” standard in certain instances, such as here, the proper forum for getting that policy changed is to file for a rulemaking proceeding.¹⁹ Finally, MBB submits the statement of Application preparer Paul Reynolds, not made under penalty of perjury, who states, in sum, that the original designation of the transmitter site was the product of a “misunderstanding” and not an “intentional mis-designation” of the site at any time.²⁰

Discussion. Pursuant to Section 309(d) of the Communications Act of 1934, as amended (Act),²¹ a petition to deny must provide properly supported allegations of fact that, if true, establish a substantial and material question of fact that granting the application would be *prima facie* inconsistent with the public interest, convenience, and necessity.²² In this case, the Petition must establish a substantial and material question of fact that grant of the Application would be inconsistent with Section 74.1204(f) of the Rules.

Site Assurance. An applicant seeking a new broadcast facility must, in good faith, possess “reasonable assurance” of a transmitter site at the time it files its application.²³ The Commission repealed the requirement that broadcast auction applicants certify the availability of the transmitter site when it adopted its competitive bidding procedures.²⁴ Nevertheless, the Commission retained the “reasonable assurance” standard for site availability.²⁵ For example, the instructions to FCC Form 349 underscores this requirement and admonishes applicants that “[a]ll applicants for broadcast facilities must have a reasonable assurance that the specified site will be available **at the time they file FCC Form 349.**”²⁶

In *Falletti*, the Commission considered the issue of whether an FM auction applicant may amend to specify a new transmitter site where it lacked reasonable assurance of the availability of its originally-specified transmitter site. Therein, the Commission noted that, in the 1998 *Auction Order*, it adopted a liberal amendment policy for auction applicants, under which “[l]ong-form applications for new facilities and for major changes in existing facilities in all broadcast services will no longer be immediately

¹⁶ Response at 1 and 3. The amendment was filed on February 28, 2018.

¹⁷ *Id.* at 2, citing *Edward A. Schober*, Memorandum Opinion and Order, 31 FCC Rcd 4296 (2016) (*Schober*).

¹⁸ *Id.*

¹⁹ *Id.* at 2.

²⁰ *Id.* at 3, n.3 and at Attachment.

²¹ See 47 U.S.C. § 309(d).

²² See, e.g., *WWOR-TV, Inc.*, Memorandum Opinion and Order, 6 FCC Rcd 193, 197 n.10 (1990), *aff’d sub nom. Garden State Broadcasting L.P. v. FCC*, 996 F.2d 386 (D.C. Cir. 1993), *rehearing denied* (Sept. 10, 1993); *Area Christian Television, Inc.*, Memorandum Opinion and Order, 60 RR 2d 862, 864 (1986) (petitions to deny must contain adequate and specific factual allegations sufficient to warrant the relief requested).

²³ See, e.g., *Port Huron Family Radio, Inc.*, Decision, 66 RR 2d 545 (1989); *Radio Delaware, Inc.*, Memorandum Opinion and Order, 67 RR 2d 358 (1989).

²⁴ See *Implementation of Section 309(j) of the Communications Act*, First Report and Order, 13 FCC Rcd 15920 (1998).

²⁵ See Instructions to FCC Form 349 at 2 (“the Commission’s substantive site availability requirements are unchanged”).

²⁶ *Id.* (emphasis in original).

returned for defects pertaining to completeness or technical or legal acceptance criteria, without ample opportunity to correct the deficiency . . . [and] the new processing standards for broadcast long-form applications will enable applicants for new facilities and for major changes to avoid dismissal and to liberally correct heretofore fatal defects in application information.”²⁷ The Commission also clarified in *Schober* that the liberal amendment policy applies to site availability defects in the same way that it does to all other application defects in the auctioned services.²⁸ The Commission did not draw a distinction between full-service and FM translator auction applicants, and in fact Section 73.3522(a), which codified the liberal amendment policy,²⁹ specifically applies to “applicants in all broadcast services subject to competitive bidding . . . ,”³⁰ including FM translator applicants. Because auction applicant MBB is therefore allowed under the liberal amendment policy to amend the Application to cure the alleged site availability defect, and has done so, we find that further discussion of this issue is unwarranted.

Additionally, we reject Troy’s misguided argument that, even should the liberal amendment policy in *Falletti* be applied here, the policy should be re-evaluated because it causes a waste of Commission resources. On the contrary, in adopting the policy, the Commission indicated that actually litigating site-availability issues (in the absence of a false certification dimension not argued or present here) causes the waste of Commission resources:

The winning bidder is subject to the same requirements regarding the payment of the winning bid, and the same payment provisions in the event of a default as any other broadcast applicant granted a construction permit through a system of competitive bidding. It is those requirements, rather than the original certifications, that serve as a mechanism to discourage insincere proposals. For this reason, adjudicating issues relating to whether the winning bidder had reasonable assurance of site availability or was financially qualified would waste the resources of the Commission and of the parties and would serve only to delay service to the public.³¹

We will not reconsider that orientation here.

Finally on this issue, we find that MBB’s amendment to the Application was not defective, and we have accepted the amendment.

Harmful Interference. In promulgating Section 74.1204(f) of the Rules, the Commission stated that it “will not grant an application if an objecting party provides convincing evidence that the proposed translator station would be likely to interfere with the reception of a regularly received off-the-air existing service, even

²⁷ See *Implementation of Section 309(j) of the Communications Act—Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Services Licenses*, First Report and Order, 13 FCC Rcd 15920, 15986-87, paras. 169-170 (1998) (*Auction Order*).

²⁸ See *Schober*, 31 FCC Rcd at 4298, para. 9. The “liberal amendment” policy regarding site availability attaches to a broadcast auction applicant irrespective of whether the construction permit at issue actually proceeded to comparative bidding. *Schober*’s application, for example, was determined to be a “singleton” not mutually exclusive with any other proposal. To the extent that the Instructions to FCC Forms 301 and 349 do not reflect the Commission’s holding in *Falletti*, the Commission directed the Media Bureau to modify the relevant language as necessary when these forms are transitioned to the new License and Management System (LMS). See *id.* at 4299, n.19, citing *Media Bureau Announces Completion of First Phase of Licensing and Management System for Full Power TV Stations*, Public Notice, 29 FCC Rcd 11585 (MB 2014).

²⁹ See *Schober*, 31 FCC Rcd at 4298, para. 8.

³⁰ 47 CFR § 73.35232(a)(1).

³¹ *Auction Order*, 13 FCC Rcd at 15956, para. 99 (1998).

if there is no predicted overlap.”³² Under Section 74.1204(f), in order to provide “convincing evidence” that grant of an FM translator construction permit application “will result in interference to the reception” of an existing station, an opponent must provide, at a minimum: (1) the name and specific address of each potentially affected listener; (2) some demonstration that the address of each purported listener falls within the 60 dBμ service contour of the proposed translator station;³³ (3) a declaration from each of the affected listeners that he or she listens to the station at the specified location; and (4) some evidence that grant of the authorization will result in interference to the reception of the “desired” station at that location.³⁴ The Commission has stated that “[t]he best method, of course, is to plot the specific addresses on a map depicting the translator station’s 60 dBμ contour.”³⁵

In this case, Troy fails to identify and provide declarations from specific listeners within the Application’s predicted 60 dBμ service contour.³⁶ Troy thus fails to provide convincing evidence that the proposed FM translator station would be likely to interfere with the reception of Troy’s Station WTBF-FM.

Conclusion/Actions. In light of the discussion above, we find that Troy has not raised a substantial and material question of fact calling for further inquiry regarding whether grant of the Application will further the public interest, convenience, and necessity. We will therefore deny the Petition. Additionally, we have evaluated the amended Application and find that it complies with all pertinent statutory and regulatory requirements and that its grant would further the public interest, convenience, and necessity.

Accordingly, IT IS ORDERED, that the Petition to Deny filed by Troy Broadcasting Corporation on January 19, 2018, IS DENIED.

³² See *Association for Cmty. Education, Inc.*, Memorandum Opinion and Order, 19 FCC Rcd 12682, 12685-6, paras. 7-9 (2004) (*Association*), citing *Amendment of Part 74 of the Commission’s Rules Concerning FM Translator Stations*, 5 FCC Rcd 7212, 7230 (1990), *modified*, 6 FCC Rcd 2334 (1991), *recon. denied*, 8 FCC Rcd 5093 (1993).

³³ The staff generally requires demonstrations of actual or potential interference from listeners within the translator station’s proposed 60 dBμ contour who are unconnected with the full-service station whose service allegedly will be disrupted. See *Association*, 19 FCC Rcd at 12688 n.37 (approving staff practice requiring that the complainant be “disinterested.”)

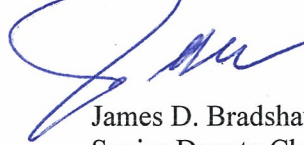
³⁴ *Id.*, 19 FCC Rcd at 12687.

³⁵ *Id.*

³⁶ The declaration from Troy Secretary Richard W. Gilchrist, Sr., made under penalty of perjury, that the proposed translator will interfere with WTBF-FM’s signal and Troy’s submission of a map purporting to show “substantial predicted interference” according to a Longley-Rice study that does not plot any affected listeners, is insufficient. See Petition at Attachments. See also, e.g., *Richard J. Bodorff, Esq., Malcolm G. Stevenson, Esq., Kevin F. Reed, Esq. and Sally A. Buckman, Esq.*, Letter Order, 27 FCC Rcd 4870, 4872 (MB 2012) (petitioner fails to satisfy Section 74.1204(f) requirement to identify and provide declarations from specific listeners within application’s predicted 60 dBμ service contour).

IT IS FURTHER ORDERED, that the Application (File No. BNPFT-20171220ABH) of Michael Butler Broadcasting, LLC, for a new FM Translator Station at Tallassee, Alabama, IS GRANTED.

Sincerely,



James D. Bradshaw
Senior Deputy Chief
Audio Division
Media Bureau

cc: Michael Butler Broadcasting, LLC
Troy Broadcasting Corporation