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In Reply Refer to:
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Positive Hope, Inc.
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In re: **New FM Translator, El Cajon, CA**
Facility ID No. 203018
File No. BNPFT-20190731AAZ

KVIB-LP, San Diego, CA
Facility ID No. 197704
File No. BPL-20190909ABO

**Petitions for Reconsideration
Informal Objection**

Dear Counsel and Petitioner:

We have before us: (1) a petition for reconsideration (Family Petition) filed on September 6, 2019, by Family Stations, Inc. (Family), seeking reinstatement *nunc pro tunc* of the above-referenced long-form application (Translator Application) for a construction permit for a new FM translator at El Cajon, California;¹ and (2) a petition for reconsideration (Positive Hope Petition) filed on October 10, 2019, by Positive Hope Inc. (Positive Hope), challenging the September 19, 2019, dismissal of the above-referenced application (KVIB-LP Modification Application) for modification of the facilities of low power station KVIB-LP, San Diego, California (KVIB-LP);² and (3) an informal objection filed by Positive Hope on October 10, 2019 (Informal Objection), objecting to a September 9, 2019, amendment to the Translator Application (Translator Amendment). For the reasons stated below, we grant the Family Petition, reinstate the Translator Application as amended *nunc pro tunc* and accept it for filing, deny the Informal Objection, and deny the Positive Hope Petition.

Background. Family was the winning bidder for a new cross-service translator station at El Cajon, California (Translator) in Auction 100.³ On July 31, 2019, Family filed the Translator Application. On August 2, 2019, the Bureau issued the *Translator Dismissal Letter* dismissing the Translator Application because the proposed facility violated the contour overlap requirements established in the *1992 Agreement Between the Government of the United States of America and the Government of the United Mexican States Relating to the FM Service in the Band 88-108 MHz, August*

¹ The Audio Division, Media Bureau (Bureau) dismissed the Translator Application on August 2, 2019. *Family Stations, Inc.*, Letter Decision, Ref. No. 1800B3-RG (MB Aug. 2, 2019) (*Translator Dismissal Letter*).

² *Positive Hope, Inc.*, Letter Decision, Ref. No. 1800B3-RG (MB Sept. 19, 2019) (*KVIB-LP Dismissal Letter*).

³ *Auction of Cross-Service FM Translator Construction Permit Closes—Winning Bidders Announced for Auction 100*, Public Notice, 34 FCC Rcd 5212 (MB/OEA 2019), Attach. A.

11, 1992 (*USA-Mexico Agreement*).⁴ On September 6, 2019, Family filed the Family Petition and Translator Amendment, specifying a new frequency and requesting reinstatement of the Translator Application *nunc pro tunc*.⁵ On September 9, 2019, Positive Hope filed the KVIB-LP Modification Application seeking a new transmitter site for KVIB-LP. On September 19, 2019, the Bureau dismissed the KVIB-LP Modification Application for failure to comply with the minimum distance separation requirements with respect to the Translator.⁶ On October 10, 2019, Positive Hope filed the Informal Objection to the Translator Amendment and the Positive Hope Petition, seeking reconsideration of the dismissal of the KVIB-LP Modification Application. Family did not respond to either the Informal Objection or the Positive Hope Petition.

In its Petition for Reconsideration, Family argues that the Translator Amendment is permissible under section 74.1233(a)(1)(i)(A)(2) of the rules, which defines as an application for minor change any application seeking to make a channel change to any same-band frequency “upon a showing of interference to or from any other broadcast station.”⁷ Family cites interference with station KKLJ(FM), Julian, California (KKLJ), as the basis for the Translator Amendment and claims to have identified “at least 83 individuals” who are located “within or very close to the area in which the 60 dBu contour of the [Translator] overlaps the 45 dBu contour of Station KKLJ” and who would “likely experience interference if the Translator were to operate on the frequency proposed in the initial Application.”⁸

In the Informal Objection and Positive Hope Petition, Positive Hope contends that Family is not eligible to apply for a non-adjacent channel change under section 74.1233(a)(1)(i)(A)(2).⁹ Specifically, Positive Hope argues that Family—as a new station licensee whose initial long form application did not comply with the *USA-Mexico Agreement*—cannot demonstrate interference because “[n]o interference can exist for a translator that cannot exist.”¹⁰ Moreover, according to Positive Hope, if a non-adjacent channel change were allowed in this circumstance, “any translator applicant that gets dismissed for any fatal translator engineering error would simply find any nearby FM broadcaster that would appear to interfere with the translator applicant’s original proposal, then pull together a Petition for Reconsideration”¹¹ Positive Hope warns that such a “back-door route . . . would render the default minor change rule of first, second, third adjacent channel, and I.F. [intermediate frequency] restrictions within §74.1233(a)(1)(i)(A)(1) obsolete.”¹²

Positive Hope also argues that the Translator Amendment was unacceptable at the time it was filed because the specified facility conflicted with co-channel station DKRSA-LP, El Cajon, California (DKRSA-LP).¹³ The DKRSA-LP license was cancelled at the licensee’s request prior to the filing of the

⁴ *Translator Dismissal Letter* at 1 (citing *USA-Mexico Agreement*, Article 7, available at <http://transition.fcc.gov/ib/sand/agree/files/mex-bc/fmhc.pdf> (last visited June 9, 2020)). Specifically, the Bureau found that the proposed Translator would cause impermissible contour overlap with station XHTY-FM, Tijuana, Baja California, Mexico.

⁵ Family Petition at 1.

⁶ *Positive Hope Inc.*, Letter Decision, Ref. No. 1800B3-GL (MB Sept. 19, 2019).

⁷ Family Petition at 3-4 (citing 47 CFR § 74.1233(a)(1)(i)(A)(2) (section 74.1233)); see also *Amendment of Part 74 of the Commission’s Rules Regarding Translator Interference*, Report and Order, 34 FCC Rcd 3457 (2019) (*Report and Order*) (petitions for reconsideration pending); *Media Bureau Announces August 13, 2019, Effective Date of Amended Rules for FM Translator Interference*, Public Notice, 34 FCC Rcd 7004 (MB 2019).

⁸ Family Petition at 4.

⁹ Informal Objection at 4-5 (citing 47 CFR § 74.1233(a)(1)(i)(A)(2) (section 74.1233)).

¹⁰ Informal Objection at 5-6.

¹¹ *Id.* at 7.

¹² *Id.* at 6.

¹³ *Id.* at 2-3.

Translator Amendment; however, a petition for reconsideration of this cancellation was pending.¹⁴ The Bureau denied this petition for reconsideration on September 10, 2019.¹⁵

Discussion. We will consider a petition for reconsideration only when the petitioner shows either a material error in the original order or raises additional facts not known or existing at the time of the petitioner's last opportunity to present such matters.¹⁶ An informal objection must provide properly supported allegations of fact which, if true, would establish a substantial and material question of fact regarding whether grant of the application in question would be consistent with the public interest, convenience and necessity.¹⁷ Positive Hope has failed to meet either burden.

As a threshold matter, we find that section 74.1233(a)(1)(i)(A)(2) applies to amendments to long-form applications for new translator stations. The governing provision is section 74.1233(d)(5)(iii) of the Commission's rules, which states that winning bidders filing long-form applications may change the technical proposals specified in their previously submitted short-form applications only if such change does not constitute a major change (which is defined in section 74.1233(a)).¹⁸ Therefore, the channel change rule set out in section 74.1233(a)(1)(i)(A)(2) applies to amendments to long-form applications, and Family is eligible to seek a non-adjacent channel change for the Station. Furthermore, under longstanding Commission policy, we will favorably consider petitions for reconsideration of an initial dismissal or return of an application when the applicant submits a curative amendment within 30 days of dismissal.¹⁹ In such cases, the dismissed application is reinstated *nunc pro tunc*; that is, as of the date it was originally filed.

We find that Family has made the requisite showing of interference to justify a non-adjacent channel change under section 74.1233(a)(1)(i)(A)(2). As explained in the *Report and Order*, such a showing may consist of a "simple engineering statement of mitigation of interference at the requested frequency."²⁰ An unbuilt station, by necessity, must submit a showing of predicted rather than actual interference. In this case, there is a sizable zone of potential interference within the contour overlap of the Translator's 25 dBu contour and KKLJ's 45 dBu contour, which indicates a substantial possibility of interference to KKLJ listeners in this area should the Translator be constructed on its original frequency.²¹ No such zone of potential interference would be created with another broadcast station at the proposed frequency. Therefore, we accept Family's showing that the proposed non-adjacent channel change would mitigate or avoid predicted interference.

¹⁴ See *La Maestra Family Foundation*, Letter Decision, Ref. No. 1800B3-IB (MB Sept. 10, 2019).

¹⁵ *Id.*

¹⁶ See 47 CFR §§ 1.106(c), (d); *WWIZ, Inc.*, Memorandum Opinion and Order, 37 FCC 685, 686 (1964).

¹⁷ See, e.g., *WWOR-TV, Inc.*, Memorandum Opinion and Order, 6 FCC Rcd 193, 197 n.10 (1990); *Area Christian Television, Inc.*, Memorandum Opinion and Order, 60 RR 2d 862, 864 (1986).

¹⁸ 47 CFR § 74.1233(d)(5)(iii); 47 CFR § 74.1233(a).

¹⁹ See, e.g., *Hampton Roads Educational Telecommunications Association, Inc.*, Memorandum Opinion and Order, 30 FCC Rcd 14906 (MB 2015); see generally, *Commission States Future Policy on Incomplete and Patently Defective AM and FM Construction Permit Applications*, Public Notice, 56 RR 2d 776, 49 Fed. Reg. 47331 (Aug. 2, 1984).

²⁰ *Report and Order*, 34 FCC Rcd at 3461, para. 8. This standard for translator non-adjacent channel changes harmonizes closely with the corresponding provision for LPFM stations under section 73.870(a) of the rules, which states that non-adjacent frequency changes may be requested as a minor change "upon a technical showing of reduced interference." *Id.* (citing 47 CFR § 73.870(a)).

²¹ See *Report and Order*, 34 FCC Rcd at 3475, para. 36 (defining objectionable interference in the translator context as that occurring within the complaining station's 45 dBu signal strength contour); *Id.* at 3469, para. 23 (defining the zone of potential interference as the area within which the ratio of undesired to desired signal strength exceeds 20 dB for co-channel stations, calculated using the Commission's standard contour prediction methodology).

We also find unavailing Positive Hope's argument that the Translator Application should have been dismissed for failure to protect DKRSA-LP. Although a petition for reconsideration was pending at the time the Translator Application was filed, the DKRSA-LP license had been cancelled at the licensee's request. The filing of a petition for reconsideration does not automatically stay the decision for which reconsideration is sought.²² Rather, a Bureau action remains in full force and effect despite any pending appeals, such as a petition for reconsideration.²³ Therefore, there is no basis for reconsidering the staff's decision not to dismiss the Translator Application due to the status of the cancelled DKRSA-LP facility.

Conclusion/Actions. For these reasons, IT IS ORDERED that the petition for reconsideration filed by Family Stations, Inc. on September 6, 2019, IS GRANTED.

IT IS FURTHER ORDERED that the new translator application, File No. BNPFT-20190731AAZ, filed by Family Stations, Inc. on July 31, 2019, as amended, IS REINSTATED *NUNC PRO TUNC* AND ACCEPTED FOR FILING.

IT IS FURTHER ORDERED that the informal objection filed by Positive Hope Inc. on October 10, 2019, IS DENIED.

IT IS FURTHER ORDERED that the petition for reconsideration filed by Positive Hope Inc. on October 10, 2019, IS DENIED.

Sincerely,

Albert Shuldiner
Chief, Audio Division
Media Bureau

²² See 47 CFR §§ 1.102(b)(1) and (2).

²³ 47 CFR § 1.102(b); *Committee to Save WEAM v. FCC*, 808 F.2d 113, 119 (D.C. Cir. 1986).