



**Federal Communications Commission**

Washington, D.C. 20554

June 2, 2020

*In Reply Refer to:*  
1800B3-AR

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**In re: WURK-LP, Tampa, FL**  
Rainbow Heights Neighborhood Association  
and Crime Watch  
Facility ID No. 197046  
File No. BLL-20190805AAC

**Petition for Reconsideration**

Dear Counsel:

We have before us a petition for reconsideration (Petition) filed by Tampa Radio, Inc. (Tampa Radio) on September 11, 2019. Tampa Radio seeks reconsideration of the Audio Division, Media Bureau (Bureau)'s August 7, 2019, grant of the above referenced application (License Application) filed by Rainbow Heights Neighborhood Association and Crime Watch (Rainbow Heights or Licensee) for a license to cover low power FM (LPFM) station WURK-LP, Tampa, Florida (Station).<sup>1</sup> Also before us are related responsive pleadings.<sup>2</sup> For the reasons set forth below, we grant the Petition in part, rescind grant of the License Application, dismiss the License Application, and dismiss the Opposition as moot.

**Background.** On August 6, 2018, Rainbow Heights filed a request for silent Special Temporary Authority (STA), attesting that the Station went silent on August 6, 2018, due to financial inability to continue operating at its authorized site. Bureau staff granted the silent STA on August 24, 2018.<sup>3</sup> On February 1, 2019, Rainbow Heights filed a request to extend the silent STA, and Bureau staff granted the

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<sup>1</sup> The License Application was filed on August 5, 2019, and granted on August 7, 2019. *See Broadcast Actions*, Public Notice, Report No. 49548 (rel. Aug. 12, 2019); BLL-20190805AAC.

<sup>2</sup> On October 3, 2019, Rainbow Heights filed an Opposition to Petition for Reconsideration (Opposition). On October 15, 2019, Tampa Radio submitted a request for extension of time until October 23, 2019, to file a reply to the Rainbow Heights Opposition. As of the date of this Letter, Tampa Radio has not filed a reply.

<sup>3</sup> *See* BLSTA-20180806ABG.

extension on April 3, 2019.<sup>4</sup> On July 1, 2019, Rainbow Heights filed a construction permit application (Permit Application) to relocate and restore operation prior to the August 7, 2019 STA expiration.<sup>5</sup> The Permit Application was granted on July 15, 2019 and the corresponding License Application, the subject of the Petition, was granted August 7, 2019.<sup>6</sup> On September 24, 2019, Rainbow Heights filed a Notification of Suspension of Operations and Request for Silent STA, citing August 7, 2019 as the date of station silence.<sup>7</sup> Staff granted the STA on October 3, 2019.<sup>8</sup> On February 3, 2020, Rainbow Heights filed an extension of the September 2019 STA.<sup>9</sup>

In its Petition, Tampa Radio, assignee of FM translator station W241DH, Bradenton, Florida, maintains that WURK-LP has been operating with unauthorized facilities for more than a year in violation of section 312(g) of the Act.<sup>10</sup> Procedurally, Tampa Radio states that it was unable to object to the License Application prior to grant because the License Application was approved two days after filing, which precluded Tampa Radio from participating in the application process.<sup>11</sup> Petitioner argues that although Rainbow Heights filed the Permit Application and corresponding License Application, Rainbow Heights resumed broadcasting with temporary equipment that was dismantled on multiple occasions after grant of the Permit Application and License Application and that violates zoning regulations.<sup>12</sup> In support of these claims, Tampa Radio submits the affidavit of private investigator Michael Lynch (Lynch Affidavit) and numerous photographs of the transmitter site from July 30, 2019 to August 17, 2019.<sup>13</sup>

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<sup>4</sup> See BLESTA-20190131ACB.

<sup>5</sup> See BPL-20190701AAA. On December 11, 2019, the Commission released a report and order extending the construction period for LPFM stations from 18-months to three years. Licensee's construction permit was granted on July 15, 2019 and will expire on July 15, 2022. See *In the Matter of Reexamination of the Comparative Standards and Procedures for Licensing Noncommercial Educational Broadcast Stations and Low Power FM Stations*, Report and Order, 34 FCC Rcd 12519, at 12545, para. 63 (2019).

<sup>6</sup> See BLL-20190805AAC.

<sup>7</sup> See BLSTA-20190923ABS (September 2019 STA). Bureau staff granted this STA relying on information provided by Petitioner. It is a fundamental principle of the regulatory process that the Commission must routinely rely upon the representations of its licensees and applicants. See *Eagle Broad. Grp., Ltd.*, Memorandum Opinion and Order, 23 FCC Rcd 588, 595 (2008), *aff'd sub nom. Eagle Broad. Group, Ltd. v. FCC*, 563 F.3d 543, 553 (D.C. Cir. 2009). Staff granted this STA but also emphasized that grant of the STA cannot be construed to authorize the station's silence between September 7, 2019, and September 23, 2019. See October 3, 2019 STA Letter.

<sup>8</sup> *Id.*

<sup>9</sup> See BLESTA-20200203AAB (February 2020 STA Extension).

<sup>10</sup> 47 U.S.C. 312(g); Petition at 1.

<sup>11</sup> Petition at 1-2.

<sup>12</sup> Petition at 2-3.

<sup>13</sup> *Id.* Attachment 1, Lynch Affidavit and Photographs. In the Lynch Affidavit, Lynch states that: 1) he began surveillance of the Station located at 1609 North Albany Avenue, Tampa, Florida, on July 30, 2019, and continued daily surveillance through August 17, 2019; 2) there was no activity at the site and no antenna or tower on the building roof from July 30, 2019 to August 2, 2019; 3) on August 3, 2019, individuals assembled an antenna, pole, and transmission line that did not appear to be attached to the building structure; 4) the antenna, pole, and transmission line were again assembled for roughly an hour on August 4, 2019; 5) the antenna was removed from the building on August 5, 2019 and August 6, 2019; 6) on August 7, 2019, a city official informed the individuals at the site that they were too close to power lines and required permits and zoning approval; and 7) from August 7, 2019 to August 17, 2019, the location did not have an antenna, pole, or transmission line, nor was the Station broadcasting on its licensed channel. Lynch's statements are supported by the photographs attached to the Lynch Affidavit.

In its Opposition, Rainbow Heights argues that: 1) the Petition should be dismissed or denied because Petitioner's reliance on *KCIY(FM), Helendale, CA*; <sup>14</sup> is misplaced since KCIY(FM)'s license was found to have expired due to both construction of temporary facilities and non-operation for over one year whereas WURK-LP's broadcast on August 3, 2019 from a permanent new studio prevented the elapse of one year of non-operation; <sup>15</sup> 2) Petitioner conflates termination of a license due to twelve consecutive months of silence under section 312(g) of the Communications Act of 1934, as amended (Act) with the section 73.3598(e) construction deadlines contained in the Commission's rules (Rules); <sup>16</sup> 3) Tampa Radio's hired private investigator is not credible because he is affiliated with Tampa Radio and his narrative is selective; <sup>17</sup> and 4) revoking WURK-LP's license would favor and give priority to an FM translator that should have equal status with LPFM stations. <sup>18</sup>

**Discussion.** Section 1.106(c)(1) of the Rules <sup>19</sup> provides that the Bureau will only accept a petition for reconsideration relying on facts not previously presented to the Commission if: (1) the petition relies on facts relating to events which have occurred, or circumstances which have changed since the last opportunity to present such matters; (2) 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; or (3) the designated authority determines that consideration of the facts relied on is required in the public interest. <sup>20</sup>

Section 1.106(b)(1) of the Rules provides that if the petition is filed by a person who is not a party to the original proceeding, it must show good reason why it was not possible for petitioner to participate in the earlier stages of the proceeding. <sup>21</sup> Although Petitioner was not a party to the original proceeding, the Commission has held that when the public has less than one week to file an objection, the public may be precluded from participation in the application process. <sup>22</sup> Petitioner could only have filed a challenge to the pending License Application from August 5, 2019 to August 7, 2019. Because the License Application was granted two days after filing, we find it appropriate to consider the Petition, pursuant to section 1.106(b)(1) and (c)(1).

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<sup>14</sup> See *KCIY(FM), Helendale, CA*, Letter Order, 30 FCC Rcd 4898 (MB 2015) (*Helendale*).

<sup>15</sup> Petition at 2-3.

<sup>16</sup> 47 U.S.C. § 312(g); 47 CFR § 73.3598(e); Petition at 2-3.

<sup>17</sup> Petition at 4.

<sup>18</sup> *Id.* See also *Local Community Radio Act of 2010*, Pub. L. No. 111-371, 124 Stat. 4072 (2011).

<sup>19</sup> 47 CFR § 1.106(c)(1) ("In the case of any order other than an order denying an application for review, a petition for reconsideration . . . may be granted only [if] . . . the facts or arguments fall within one or more of the categories set forth in § 1.106(b)(2) . . .").

<sup>20</sup> 47 CFR § 1.106(b); see also *Coosa Valley News, Inc., c/o Mr. Thom Holt, Mr. Howard C. Toole*, Letter Order, 23 FCC Rcd 17310, 17313 (MB 2008); *WWIZ, Inc.*, Memorandum Opinion and Order, 37 FCC Rcd 685, 686, para. 2 (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).

<sup>21</sup> 47 CFR § 1.106(b)(1).

<sup>22</sup> See *Gabriel Arango JNE Investments, Inc.* Letter Order, 23 FCC Rcd 1823, 1823 (MB 2008) ("expedient grant of the applications had not allowed sufficient time for potential objections to be filed, and thus, that it was in the public interest to allow those parties to file petitions for reconsideration."); see also *Ted and Jana Tucker*, Memorandum Opinion and Order, 4 FCC Rcd 2816, para. 3 (1989) (concluding that a petitioner that had not participated previously had standing when modification application granted four days after Public Notice of its acceptance).

Section 319(c) of the Act<sup>23</sup> imposes a stringent standard on challenges to license applications. As long as “all the terms, conditions, and obligations set forth in the application and permit have been fully met,” an applicant for a license to cover a construction permit is entitled to a high degree of protection and a presumption that the public interest determination made during the underlying construction permit proceedings continues in effect unless circumstances have arisen that would make operation of the Station against the public interest.<sup>24</sup> In this case, we find that Tampa Radio has met this standard by demonstrating that Rainbow Heights operated with temporary facilities before and after grant of the License Application.

*Temporary Construction.* Section 319(c) of the Act provides that “[u]pon completion of any station for the construction or continued construction of which a permit has been granted, and upon it being made to appear to the Commission that all the terms, conditions, and obligations set forth in the application and permit have been fully met . . . the Commission shall issue a license to the lawful holder of said permit for the operation of said station.”<sup>25</sup> After completion of construction, an LPFM permittee is required to file FCC Form 319,<sup>26</sup> which requires the applicant to certify that “the application satisfies each of the pertinent standards and criteria set forth in the application instructions” and that “the facility was constructed as authorized in the underlying construction permit.”<sup>27</sup>

The Commission has held that implicit in the filing of any facility application is that the applicant stands “ready, willing, and able” to construct and operate as proposed.<sup>28</sup> The station facilities must “endure beyond the *de minimis* period necessary for it to file a license application.”<sup>29</sup> We have considered both physical and legal limitations when considering whether a facility was constructed temporarily.<sup>30</sup> For example, we have found that use of a telescoping antenna powered by a portable generator is a physical impediment to long term operation and thus signifies temporary construction.<sup>31</sup> Similarly, a failure to obtain permission from the landowner constitutes a legal impediment preventing long term operation that also justifies a finding of temporary construction.<sup>32</sup> Failure to obtain necessary local or state permitting is considered a legal impediment to construction or operation if lack of such permitting precludes construction of the relevant facility or violation of which necessitates dismantling of

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<sup>23</sup> 47 U.S.C. § 319(c).

<sup>24</sup> *See id.* (requiring the Commission to issue a license where a construction permit has been granted and it appears that the terms of such permit have been met, and “that no cause or circumstance arising or first coming to the knowledge of the Commission since the granting of the permit would, in the judgment of the Commission, make the operation of such station against the public interest...”); *Focus Cable of Oakland, Inc.*, Memorandum Opinion and Order, 65 FCC 2d 35, 39-40, para. 11 (1977).

<sup>25</sup> 47 U.S.C. § 319(c).

<sup>26</sup> 47 CFR § 73.3536.

<sup>27</sup> License Application FCC Form 319, Section 2, Question 1 and Section 3, Question 1.

<sup>28</sup> *Pathfinder Communication Corporation*, Memorandum Opinion and Order, 18 FCC Rcd 9272, 9279 (2003).

<sup>29</sup> *Helendale*, 30 FCC Rcd at 4901.

<sup>30</sup> *Matinee Media Corporation*, Letter Order, 33 FCC Rcd 6685, 6690 (MB 2018) (*Matinee*).

<sup>31</sup> *Broadcast Towers, Inc.*, Order, 26 FCC Rcd 7681, 7684, paras. 3-5 (MB 2011).

<sup>32</sup> *See, e.g., Helendale*, 30 FCC Rcd at 4999 (finding the construction was temporary where the construction site was located on land controlled by the Bureau of Land Management (BLM), BLM did not authorize construction, and BLM administrator stated that any such request would have been denied as inconsistent with BLM’s land use policies).

the facility.<sup>33</sup> A key indicator of proper construction that is not temporary is long-term operation of the station (meaning, generally, at least a year).<sup>34</sup>

The temporary nature of Rainbow Heights' construction warrants dismissal of the License Application. The Commission does not routinely license temporary broadcast facilities.<sup>35</sup> Licensing facilities that are temporary and which are dismantled shortly after a license application is filed or which are constructed without the site owner's permission or knowledge, is fundamentally inconsistent with the Commission's licensing principles.<sup>36</sup> The Commission has emphasized "[i]t is axiomatic that at the time a station files a license application . . . that they have done so with the full intention of operating as such."<sup>37</sup>

Upon review of the record in this case, we find that the facility built by Rainbow Heights was not physically capable of sustained long-term operation. Rainbow Heights affirmed in its Permit Application that the antenna would be mounted at the authorized location.<sup>38</sup> However, Tampa Radio's photographic submissions establish that on numerous occasions, the antenna had no power or transmission source, and was partially or fully dismantled without any antenna mounted at the transmitter site.<sup>39</sup> Moreover, the Station's erratic operation and frequent dismantling are key factors indicating temporary construction. Rainbow Heights was either silent due to physical and legal impediments to construction, or intermittently resumed operations with temporary facilities inconsistent with its License authorization.

We also find that the facility was legally incapable of sustained long-term operation because Licensee did not apply for permits and zoning authorization from the city of Tampa. Tampa Radio alleges, and submitted photographic evidence confirms, that a Tampa city official inspected the antenna, instructed Licensee's representatives to remove the antenna, and left a notice on the door of the facility. Subsequently, Rainbow Heights acknowledged in its February 2020 STA Extension, that it never obtained permits or zoning approval to construct a permanent tower.<sup>40</sup>

Photographic evidence provided by Tampa Radio further demonstrates use of an antenna that was repeatedly dismantled between July 30, 2019 and August 7, 2019,<sup>41</sup> both prior to and after notice of zoning violations by Tampa city officials.<sup>42</sup> For these reasons, we conclude that WURK-LP was not

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<sup>33</sup> See *Matinee*, 33 FCC Rcd at 6689-90.

<sup>34</sup> See *W2536CL, Park Forest, Illinois*, Letter Order, 34 FCC Rcd 4594, 4598 (MB 2019).

<sup>35</sup> *Lazer*, 30 FCC Rcd at 6361, para 13.

<sup>36</sup> See *Helendale*, 30 FCC Rcd at 4901; cf. *Jeffrey L. Timmons*, Letter Order, 33 FCC Rcd 6685 (MB 2018) ("In this case, by contrast, *Matinee* obtained the landowner's permission, built a durable, guyed antenna structure conforming to the terms of its construction permit, and maintained the facilities intact and operable after construction.").

<sup>37</sup> See *Pathfinder*, 18 FCC Rcd at 9279.

<sup>38</sup> Permit Application FCC Form 318, Section VI, Question 2. Additionally, from 2014 when Licensee's original construction permit was granted, to 2019 when the License Application was granted, Licensee filed applications with various antenna structure height specifications including 39.6 meters, 27.14 meters, and 10 meters. See BPL-0190701AAA, BLL-20190805AAC, BMPL-20170223AAU, and BNPL-20131114BLO.

<sup>39</sup> Petition Attachment 1, Lynch Affidavit and Photographs. To the extent that Tampa Radio argues the Lynch Affidavit is not credible, we disagree because it is supported by ample documentary evidence.

<sup>40</sup> STA filed on February 3, 2019, File No. BLESTA-20200203AAB, Exhibit 2. Rainbow Heights stated it hired a structural engineer to obtain permits required for compliance with zoning and ordinances from the city of Tampa.

<sup>41</sup> Petition Attachment 1, Lynch Affidavit and Photographs. Photographs of the transmitter site continue for roughly ten days after August 7, 2019; however, those dates are not at issue because Rainbow Heights admitted to resumed silence on August 7, 2019.

<sup>42</sup> *Id.*

ready for either legal or physical long-term operation when it filed its License Application and thus was not fully constructed.

*Section 312(g).* Section 312(g) of the Act provides that “if a broadcasting station fails to transmit broadcast signals for any consecutive 12-month period, then the station license granted for the operation of that broadcast station expires at the end of that period, notwithstanding any provision, term, or condition of the license to the contrary...”<sup>43</sup> We reject Tampa Radio’s attempt to invoke the *Helendale* decision, which involved dismissal of a license application under section 319(b) of the Act,<sup>44</sup> to support a determination that the WURK-LP license expired pursuant to section 312(g) of the Act. Tampa Radio has not shown that WURK-LP’s short-term operations were at a variance from the facilities authorized by the grant of the Permit Application.<sup>45</sup> Accordingly, the *Helendale* decision does not support an adverse determination against WURK-LP under section 312(g).

**Conclusion.** For the reasons stated above, we find that the Station had not finalized construction of its facilities when it filed for and was granted the License Application. Therefore, the License Application is dismissed.

Accordingly, IT IS ORDERED, that the Petition for Reconsideration filed by Tampa Radio Inc. on September 11, 2019 IS GRANTED IN PART and IS DENIED in all other respects.

IT IS FURTHER ORDERED, that the grant of the License Application filed by Rainbow Heights Neighborhood Association and Crime Watch, for license to cover the construction permit of low power FM station WURK-LP, Tampa, Florida, Facility ID No. 197046, File No. BLL-20190805AAC, IS RESCINDED, and the License Application IS DISMISSED.

Sincerely,

Albert Shuldiner  
Chief, Audio Division  
Media Bureau

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<sup>43</sup> See *Implementation of Section 403(l) of the Telecommunications Act of 1996*, 11 FCC Rcd 16499 (1996); see also 47 CFR § 73.1740(c).

<sup>44</sup> 47 U.S.C. § 319(b).

<sup>45</sup> Compare *Eagle Broad. Grp., Ltd.*, Memorandum Opinion and Order, 23 FCC Rcd 588, 595 (2008), *aff’d sub nom. Eagle Broad. Group, Ltd. v. FCC*, 563 F.3d 543, 553 (D.C. Cir. 2009) (finding that unauthorized transmissions at variance from the construction permit do not preclude automatic license termination under section 312(g)), with *Silver Fish Broadcasting, Inc.*, Letter Order, 28 FCC Rcd 15816, 15819 (MB 2013) (noting that Licensee could have prevented automatic termination under section 312(g) by resuming operations with temporary, authorized facilities under STA), *application for review denied Silver Fish Broad., Inc.*, Memorandum Opinion and Order, 29 FCC Rcd 15054, 15055, para. 3 (2014), *appeal dismissed sub nom. Silver Fish Broad., Inc. v. FCC*, No. 15-1004, 2015 WL 3372262 (D.C. Cir. 2015). Although Rainbow Heights’ temporary facilities are inconsistent with section 319(b), Rainbow Heights avoided automatic termination under section 312(g) when it resumed operation under program test authority with temporary facilities that otherwise adhered to the specifications in the Permit Application.