

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

In the Matter of)	
)	
Edward A. Schober)	
)	
New FM Translator Station)	File No. BNPFT-20130325ABA
Denton, Maryland)	Facility ID No. 141493
)	
New FM Translator Station)	File No. BNPFT-2013-325ABK
Denton, Maryland)	Facility ID No. 141483
)	

MEMORANDUM OPINION AND ORDER

Adopted: August 1, 2014

Released: August 5, 2014

By the Commission:

1. The Commission has before it two nearly identical Applications for Review¹ (collectively, “AFRs”) filed by Edward A. Schober (“Schober”) on September 16, 2013. Schober seeks review of the Media Bureau’s (“Bureau”) August 19, 2013, decision² denying Schober’s May 1, 2013, Petitions for Reconsideration and Leave to Amend (collectively, the “Petitions”) and upholding the April 9, 2013, dismissal of the captioned applications for construction permits for new FM translator stations at Denton, Maryland (collectively, the “Denton Applications”). For the reasons set forth below, we dismiss in part and deny in part the Applications for Review.

2. The Denton Applications each proposed new translator facilities located within the “buffer zone”³ of the Salisbury-Ocean City, Maryland “spectrum-available”⁴ market and were required to include

¹ On November 25, 2013, Schober filed Supplements to the AFRs (collectively, “Supplements”) containing engineering information purportedly showing “that there are no LPFM applications which could be [affected] . . .” by grant of the Denton Applications. Supplements at 1. Section 1.115(d) of the Commission’s rules requires that an “application for review and any supplemental thereto” must be filed within 30 days of public notice of the Commission action. 47 C.F.R. §1.115(d). The Commission has long held that “enforcement of the procedural rules, including the proscription against the filing of untimely supplements, is necessary to manage the decision-making process in an efficient manner.” *Gresham Communications, Inc.*, Memorandum Opinion and Order, 26 FCC Rcd 11895, 11898 (2011) (dismissing supplemental filings submitted on review); *see also e.g., BDPCS, Inc.*, Memorandum Opinion and Order, 15 FCC Rcd 17590, 17596-97 (2000). We, therefore, will dismiss the unauthorized Supplements.

² *Edward A. Schober*, Letter, 28 FCC Rcd 12304 (MB 2013) (“*Staff Decision*”).

³ Applications proposing FM translator sites within 39 kilometers of any defined “Market Grid” are located in the market’s buffer zone. *See Media Bureau Announces FM Translator Auction 83 Filing Window and Filing Procedures*, Public Notice, 28 FCC Rcd 1500, 1501 (MB 2013) (“*Singleton Filing Window PN*”). The Denton Applications are 32 kilometers from the nearest grid point of the Salisbury-Ocean City market.

⁴ Spectrum-available markets are defined as “those markets in which the number of LPFM channels within the applicable grid meets or exceeds the market’s channel floor.” *See Creation of a Low Power Radio Service ; Amendment of Service and Eligibility Rules for FM Broadcast Translator Stations*, Fourth Report and Order and Third Order on Reconsideration, 27 FCC Rcd 3364, 3383 (2012) (“*Fourth Report and Order*”).

Preclusion Showings⁵ for the market, but did not.⁶ On April 9, 2013, the staff dismissed the Denton Applications.⁷ The *Staff Decision* subsequently denied Schober's petitions for reconsideration.

3. On review,⁸ Schober reiterates arguments previously made on reconsideration. He contends that he should be excused from the requirement to have submitted timely Preclusion Showings because the Denton Applications could not have a preclusive effect in the Salisbury-Ocean City market,⁹ he misinterpreted the Preclusion Showing requirement because the public notice announcing it "qualified that requirement with a very confusing paragraph of exceptions";¹⁰ and that grant of the Denton Applications serves the public interest because they would improve service to a rural area.¹¹

4. Upon review of the AFRs and the entire record, we conclude that the *Staff Decision* properly decided the matters considered therein, and we uphold the Bureau's decision for the stated reasons. The *Staff Decision* did not specifically consider Schober's argument that he should be excused for his failure to timely file Preclusion Showings because, in fact, the Denton Applications did not preclude any LPFM licensing opportunities and he *could have* timely filed acceptable Preclusion Showings. However, we find that this omission constitutes harmless error. Schober provides no support for this waiver theory which, in any event, conflicts with long-standing application processing policies enforcing filing deadlines.¹² Moreover, in the instant case, such a processing policy would have undermined the Commission's stated goals of expeditiously processing six thousand FM translator applications and

⁵ Preclusion Showings must demonstrate that the application would not preclude any protected LPFM licensing opportunities. *See Id.* at 3385-86.

⁶ In the *Singleton Filing Window PN* the Bureau stated that any Form 349 proposal which differed from the original tech box proposal, as is the case here, and proposed a transmitter site at a location within the 39-kilometer "buffer" of any defined "Market Grid," as is the case here, would be required to file a Preclusion Showing. *Singleton Filing Window PN*, 28 FCC Rcd at 1501. The deadline for submitting Preclusion Showings for singleton applications was March 28, 2013, over a month after that PN was released. *Id.* The Bureau further stated, in bold print, that a Preclusion Showing "may not be submitted, amended, corrected, completed or resubmitted for further consideration . . ." after that date. *Id.* at 1502. On March 18, 2013, the Bureau released a further public notice, again reminding applicants, including those which, like Schober, filed a technical amendment proposing a facility within 39 km of a defined Spectrum Available Market Grid, that they had to submit a Preclusion Showing by the filing deadline. The Notice cautioned, "Failure to file a required Preclusion Showing . . . by the relevant filing deadline will result in the dismissal of these Form 349 Tech Box and/or 'long form' applications." *See Media Bureau Provides Additional Guidance on Preclusion Showing Filing Requirements for Auction 83 FM Translator Applicants*, Public Notice, 28 FCC Rcd 2840 (MB 2013). On April 3, 2013, Schober untimely amended the Denton Applications with the required Preclusion Showings.

⁷ *See Broadcast Actions*, Public Notice, Report No. 47966 (rel. Apr. 12, 2013).

⁸ Also in the AFRs, Schober improperly argues for the first time on review that the Denton Applications were erroneously dismissed due to Commission staff enforcing "hard look" processing policies on Auction 83 applicants. Although the AFRs extensively address this issue, we will not consider it because Schober did not afford the Bureau an opportunity to address this argument. *See* 47 C.F.R. § 1.115(c) ("No application for review will be granted if it relies on questions of fact or law upon which the designated authority has been afforded no opportunity to pass."); *see also Spectrum IVDS, L.L.C.*, Memorandum Opinion and Order, 25 FCC Rcd 10457, 10463 (2010). Therefore, we dismiss the AFRs to the extent they make this contention.

⁹ AFRs at 2.

¹⁰ *Id.*

¹¹ *Id.* at 3.

¹² *See, e.g., Canyon Area Residents for the Environment*, Memorandum Opinion and Order, 14 FCC Rcd 8152, 8154 (1999) ("We cannot allow a party to sit back and hope that a decision will be in its favor and, when it isn't, to parry with an offer of more evidence. No judging process in any branch of government could operate efficiently or accurately if such a procedure were allowed.") (quoting *Colorado Radio Corp. v. FCC*, 118 F.2d 24, 26 (D.C. Cir. 1941)).

promptly opening an LPFM window in October 2013, which was the purpose of the March 28 filing deadline for Preclusion Showings. We conclude that the Bureau properly rejected Schober's tardily submitted Preclusion Showings.

5. ACCORDINGLY, IT IS ORDERED that, pursuant to Section 5(c)(5) of the Communications Act of 1934, as amended,¹³ and Sections 1.115(c) and (g) of the Commission's rules,¹⁴ the Applications for Review ARE DISMISSED for the reasons stated herein and ARE otherwise DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

¹³ 47 U.S.C. §155(c)(5).

¹⁴ 47 C.F.R. §§1.115(c) and (g).