

No. 15-1500

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**IN THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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NUEVA ESPERANZA, INC.,  
*Appellant,*

v.

FEDERAL COMMUNICATIONS COMMISSION,  
*Appellee,*  
G-TOWN RADIO, *et al.,*  
*Intervenors for Appellee.*

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On Appeal from an Order of  
the Federal Communications Commission

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**BRIEF FOR APPELLEE  
FEDERAL COMMUNICATIONS COMMISSION**

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**CERTIFICATE AS TO PARTIES, RULINGS,  
AND RELATED CASES**

(A) **Parties and Amici.** The Appellant is Nueva Esperanza, Inc. The Appellee is the Federal Communications Commission. The Intervenor in support of Appellee are G-town Radio, Germantown Life Enrichment Center, and Germantown United Community Development Corporation (collectively, the “Germantown Intervenor”). There are no known *amici*.

(B) **Rulings Under Review.** This appeal challenges the Federal Communications Commission’s Memorandum Opinion & Order, *LPFM MX Group 304*, 30 FCC Rcd. 13983 (2015) (*Order*), reprinted at JA237–40. The *Order* adopted the reasoning of two letter orders issued by the FCC’s Media Bureau: Letter Order, *LPFM MX Group 304*, Ref. 1800B3-ATS (FCC Media Bur. Jan. 15, 2015) (*Bureau Decision*), reprinted at JA184–91; Letter Order, *LPFM MX Group 304*, Ref. 1800B3-1B (FCC Media Bur. July 16, 2015) (*Bureau Recon. Decision*), reprinted at JA214–19.

(C) **Related Cases.** The order under review has not previously been before this Court or any other court. Counsel for Appellee are aware of no other related cases.

## TABLE OF CONTENTS

	<b>Page</b>
CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES .....	i
TABLE OF AUTHORITIES .....	iii
GLOSSARY .....	ix
INTRODUCTION.....	1
STATEMENT OF THE ISSUES .....	3
JURISDICTIONAL STATEMENT .....	4
PERTINENT STATUTES AND REGULATIONS .....	4
STATEMENT OF THE CASE.....	4
A. Statutory And Regulatory Background.....	4
B. Factual Background.....	7
C. Proceedings Below.....	10
STANDARD OF REVIEW .....	17
SUMMARY OF THE ARGUMENT.....	18
ARGUMENT.....	23
I. The FCC’s LPFM Regulations Do Not Prohibit Separate Organizations From Filing Individual License Applications With The Goal Of Aggregating Points. ....	24
II. The <i>Staff Blog Post</i> Does Not Preclude The Commission From Applying Its LPFM Regulations Here. ....	35
A. The <i>Staff Blog Post</i> Supports The Commission’s Decision. ....	36
B. Even If The <i>Staff Blog Post</i> Were To The Contrary, It Would Not Bind The Commission.....	44
C. Esperanza’s Fair-Notice Argument Is Both Forfeited And Meritless. ....	53
CONCLUSION .....	57
CERTIFICATE OF COMPLIANCE WITH RULE 32(a) .....	58
CERTIFICATE OF FILING AND SERVICE .....	59

## TABLE OF AUTHORITIES\*

<b>Cases:</b>	<b>Page(s)</b>
<i>Alaska Prof'l Hunters Ass'n v. FAA</i> , 177 F.3d 1030 (D.C. Cir. 1999), <i>abrogated by Perez</i> <i>v. Mortg. Bankers Ass'n</i> , 135 S. Ct. 1199 (2015) .....	46, 47, 48
<i>Am. Tel. &amp; Tel. Co. v. FCC</i> , 454 F.3d 329 (D.C. Cir. 2006) .....	52
<i>Appalachian Power Co. v. EPA</i> , 208 F.3d 1015 (D.C. Cir. 2000) .....	49, 51
<i>Auer v. Robbins</i> , 519 U.S. 452 (1997) .....	34
<i>Cellco P'ship v. FCC</i> , 357 F.3d 88 (D.C. Cir. 2004) .....	17
<i>Cement Kiln Recycling Coal. v. EPA</i> , 493 F.3d 207 (D.C. Cir. 2007) .....	51
<i>Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.</i> , 467 U.S. 837 (1984) .....	34
<i>Christopher v. SmithKline Beecham Corp.</i> , 132 S. Ct. 2156 (2012) .....	35, 47
<i>City of Arlington v. FCC</i> , 133 S. Ct. 1863 (2013) .....	34
<i>Cnty. Care Found. v. Thompson</i> , 318 F.3d 219 (D.C. Cir. 2003) .....	52
<i>Comcast Corp. v. FCC</i> , 526 F.3d 763 (D.C. Cir. 2008) .....	52
<i>Consolo v. Fed. Maritime Comm'n</i> , 383 U.S. 607 (1966) .....	17

---

\* *Authorities upon which we chiefly rely are marked with asterisks.*

**TABLE OF AUTHORITIES**  
**(continued)**

	<b>Page(s)</b>
<i>CropLife Am. v. EPA</i> , 329 F.3d 876 (D.C. Cir. 2003) .....	49
<i>Decker v. Nw. Env'tl. Def. Ctr.</i> , 133 S. Ct. 1326 (2013).....	18, 34, 35
<i>Devon Energy Corp. v. Kempthorne</i> , 551 F.3d 1030 (D.C. Cir. 2008) .....	49
<i>Drummond Coal Co. v. Hodel</i> , 796 F.2d 502 (D.C. Cir. 1986) .....	48
<i>FERC v. Elec. Power Supply Ass'n</i> , 136 S. Ct. 760 (2016).....	17
<i>FiberTower Spectrum Holdings, LLC v. FCC</i> , 782 F.3d 692 (D.C. Cir. 2015) .....	53
<i>Gen. Elec. Co. v. EPA</i> , 290 F.3d 377 (D.C. Cir. 2002) .....	49
<i>Indep. Equip. Dealers Ass'n v. EPA</i> , 372 F.3d 420 (D.C. Cir. 2004) .....	46
* <i>Malkan FM Assocs. v. FCC</i> , 935 F.2d 1313 (D.C. Cir. 1991) .....	14, 44, 45, 46
<i>Minn. Christian Broad., Inc. v. FCC</i> , 411 F.3d 283 (D.C. Cir. 2005) .....	34
<i>N.Y. State Dep't of Soc. Servs. v. Bowen</i> , 835 F.2d 360 (D.C. Cir. 1987) .....	48
<i>Perez v. Mortg. Bankers Ass'n</i> , 135 S. Ct. 1199 (2015).....	46, 47
<i>Rural Cellular Ass'n v. FCC</i> , 588 F.3d 1095 (D.C. Cir. 2009) .....	17

**TABLE OF AUTHORITIES**  
**(continued)**

	<b>Page(s)</b>
<i>Satellite Broad. Co. v. FCC</i> , 824 F.2d 1 (D.C. Cir. 1987) .....	54
<i>Schoenbohm v. FCC</i> , 204 F.3d 243 (D.C. Cir. 2000) .....	17
<i>Shieldalloy Metallurgical Corp. v. NRC</i> , 768 F.3d 1205 (D.C. Cir. 2014) .....	18, 34
<i>Suburban Air Freight, Inc. v. TSA</i> , 716 F.3d 679 (D.C. Cir. 2013) .....	56
<i>Thomas Jefferson Univ. v. Shalala</i> , 512 U.S. 504 (1994) .....	18
<i>United States v. Mead Corp.</i> , 533 U.S. 218 (2001) .....	48
<i>Vernal Enters., Inc. v. FCC</i> , 355 F.3d 650 (D.C. Cir. 2004) .....	52
 <b>Administrative Materials:</b>	
<i>Baltimore LPFM Order:</i>	
Mem. Op. & Order, <i>LPFM MX Group 198</i> , 30 FCC Rcd. 10540 (2015) .....	41
 * <i>Bureau Decision:</i>	
Letter Order, <i>LPFM MX Group 304</i> , Ref. 1800B3-ATS (FCC Media Bur. Jan. 15, 2015) .....	13, 14, 15, 16, 18, 25, 27, 33, 36, 37, 38, 39, 45
 * <i>Bureau Recon. Decision:</i>	
Letter Order, <i>LPFM MX Group 304</i> , Ref. 1800B3-1B (FCC Media Bur. July 16, 2015) .....	15, 16, 18, 25, 29, 31, 32, 36, 38, 39, 44, 45, 49

**TABLE OF AUTHORITIES**  
**(continued)**

	<b>Page(s)</b>
<i>LPFM First Report &amp; Order:</i>	
Report & Order, <i>Creation of a Low Power Radio Service</i> , 15 FCC Rcd. 2205 (2000) .....	4, 5, 6, 7, 26, 30, 32, 43
<i>LPFM Processing Guidance:</i>	
Public Notice, <i>Media Bureau Provides Further Guidance on the Processing of Form 38 Applications Filed in the LPFM Window</i> , 28 FCC Rcd. 16366 (Media Bur. 2013) .....	9, 28, 51
<i>LPFM Recon. Order:</i>	
Mem. Op. & Order on Recon., <i>Creation of a Low Power Radio Service</i> , 15 FCC Rcd. 19208 (2000) .....	4, 32, 43
<i>LPFM Sixth Report &amp; Order:</i>	
Fifth Order on Recon. & Sixth Report & Order, <i>Creation of a Low Power Radio Service</i> , 27 FCC Rcd. 15402 (2012) ...	6, 7, 16, 31, 32
<i>Mutually Exclusive LPFM Applications:</i>	
Public Notice, <i>Media Bureau Identifies Mutually Exclusive Applications Filed in the LPFM Window</i> , 28 FCC Rcd. 16713 (Media Bur. 2013) .....	42
<i>NCE Comparative Standards Recon. Order:</i>	
Mem. Op. & Order, <i>Reexamination of the Comparative Standards for Noncommercial Educational Applicants</i> , 16 FCC Rcd. 5074 (2001) .....	42
<i>Order:</i>	
Mem. Op. & Order, <i>LPFM MX Group 304</i> , 30 FCC Rcd. 13983 (2015) .....	4, 6, 16, 18, 25, 44
<i>Tentative Selectees Notice:</i>	
Public Notice, <i>Commission Identifies Tentative Selectees in 111 Groups of Mutually Exclusive Applications Filed in the LPFM Window</i> , 29 FCC Rcd. 10847 (2014) .....	10, 11, 28, 40, 42, 55

**TABLE OF AUTHORITIES**  
**(continued)**

	<b>Page(s)</b>
<b>Statutes And Regulations:</b>	
5 U.S.C. § 706(2) .....	17
47 U.S.C. § 309(j)(2) .....	6
47 U.S.C. § 397(6) .....	6
47 U.S.C. § 402(b) .....	4
* 47 U.S.C. § 405(a) .....	23, 27
47 C.F.R. § 1.2105(c) .....	6, 26
47 C.F.R. Subpart G—Low Power FM Broadcast Stations (LPFM), 47 C.F.R. §§ 73.801–73.881 .....	24
47 C.F.R. § 73.807(a)(1) tbl. ....	42
47 C.F.R. § 73.853(a) .....	5
47 C.F.R. § 73.872(b) .....	6
47 C.F.R. § 73.872(b)(2) .....	11
* 47 C.F.R. § 73.872(c) .....	6, 7, 11, 25, 28
47 C.F.R. § 73.872(c)(1)(i) .....	27
47 C.F.R. § 73.872(d) .....	7
47 C.F.R. § 73.3520 .....	26
47 C.F.R. § 73.3533 .....	5
47 C.F.R. § 73.3536 .....	5

**TABLE OF AUTHORITIES  
(continued)**

**Page(s)**

**Other Authorities:**

Instructions for FCC Form 318 (Oct. 2013), *available at*  
<https://transition.fcc.gov/Forms/Form318/318.pdf>..... 12, 24

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<https://www.fcc.gov/news-events/blog/2013/10/21/updated-low-power-fm-application-window-fast-approaching>..... 8, 9,  
..... 13, 14, 15, 16, 20, 21, 22, 23, 35, 36, 37, 38,  
..... 44, 45, 46, 48, 49, 50, 51, 52, 53, 54, 55, 56

**GLOSSARY**

<b>FCC or Commission</b>	Federal Communications Commission
<b>Bureau</b>	FCC Media Bureau
<b>LPFM</b>	Low Power FM radio
<b>MX</b>	Mutually Exclusive
<b>Esperanza</b>	Nueva Esperanza, Inc. ( <i>see</i> JA95–97)
<b>G-town Radio</b>	G-town Radio ( <i>see</i> JA60–61)
<b>Germantown Life</b>	Germantown Life Enrichment Center ( <i>see</i> JA32–34)
<b>Germantown United</b>	Germantown United Community Development Corporation ( <i>see</i> JA46–48)
<b>Historic Germantown</b>	Historic Germantown Preserved ( <i>see</i> JA73–75)
<b>Social Justice Project</b>	NAACP Social Justice Law Project ( <i>see</i> JA85)
<b>South Philadelphia</b>	South Philadelphia Rainbow Community Center, Inc. ( <i>see</i> JA107–08)
<b>Germantown Applicants</b>	G-town Radio, Germantown Life, German- town United, and Historic Germantown
<b>Time-Share Applicants</b>	G-town Radio, Germantown Life, German- town United, and South Philadelphia ( <i>see</i> JA167–83)
<b>Germantown Intervenors</b>	G-town Radio, Germantown Life, and Germantown United

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**BRIEF FOR APPELLEE  
FEDERAL COMMUNICATIONS COMMISSION**

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**INTRODUCTION**

Petitioner Nueva Esperanza, Inc. (“Esperanza”) challenges an FCC order granting licenses to construct a new Low Power FM radio (LPFM) station near Philadelphia, Pennsylvania, to a group of four applicants operating under a time-sharing agreement (the “Time-Share Applicants”) and dismissing Esperanza’s competing application. Esperanza contends that, under the point system used to award LPFM licenses, the Time-Share

Applicants should not have been allowed to aggregate points because some of these applicants discussed the possibility of entering into a time-sharing agreement before submitting their respective applications. Although nothing in the Commission's regulations or orders prohibits such coordination, Esperanza contends that these discussions ran afoul of statements appearing in an informal blog post written by the Chief of the FCC's Media Bureau.

The FCC correctly ruled that Esperanza's objections are baseless. Nothing in the agency's orders or regulations governing LPFM applications prohibits separate organizations from choosing to file individual applications with the goal of arriving at a time-sharing agreement and aggregating points. Esperanza has misread the blog post, which does not in fact forbid such arrangements, but instead expressly authorizes them. And in any event, the blog post amounts to informal staff advice that does not bind the Commission; this Court has repeatedly made clear that those who rely on such staff advice do so at their own risk.

Esperanza contends that allowing applicants to discuss potential time-sharing arrangements before the FCC publishes the list of qualifying applicants would violate a hypothetical Commission policy of promoting an "open negotiating process." But the hypothesized policy does not exist.

Instead, the Commission has consistently stated that the goals of LPFM service are to increase the number of new broadcast voices and to foster participation by a variety of local community organizations. Those goals are best served by accepting all qualifying time-sharing agreements, without dictating how these agreements are to be negotiated. And while the Commission has acknowledged that there is some potential for gamesmanship under the point system, it reasonably determined that its current point-aggregation rules provide the most efficient and effective means of fulfilling its LPFM policy goals. The Commission's reasonable application of its LPFM rules should be affirmed.

### **STATEMENT OF THE ISSUES**

1. Do the FCC's rules prohibit separate organizations from filing individual LPFM license applications with the goal of arriving at a time-sharing agreement and aggregating points?

2. Is the award of LPFM licenses to the winning applicants in this case precluded by language in a staff-level blog post warning against agreements that would allow a party who has not been selected for a license to nonetheless share in a winning applicant's airtime?

## JURISDICTIONAL STATEMENT

The Commission released its order denying Esperanza's application for review of the Media Bureau's order denying reconsideration on December 3, 2015. Mem. Op. & Order, *LPFM MX Group 304*, 30 FCC Rcd. 13983 (2015) (*Order*), reprinted at JA237–40. Esperanza filed a “petition for review” (more properly construed as a notice of appeal) of the *Order* on December 30, 2015. This Court's jurisdiction rests on 47 U.S.C. § 402(b).

## PERTINENT STATUTES AND REGULATIONS

Pertinent regulations are set forth in the statutory addendum bound with this brief.

## STATEMENT OF THE CASE

### A. Statutory And Regulatory Background

Seeking to create “a class of radio stations designed to serve very localized communities or underrepresented groups within communities,” the FCC established Low Power FM radio (LPFM) service in January 2000. Report & Order, *Creation of a Low Power Radio Service*, 15 FCC Rcd. 2205, 2208 ¶ 4 (2000) (*LPFM First Report & Order*), on reconsideration, 15 FCC Rcd. 19208 (2000) (*LPFM Recon. Order*). This new service was met with widespread interest from schools, churches, community groups, civic organizations, and others seeking to offer local programming that often

goes unserved by full-power radio stations. *Id.* at 2207–09 ¶¶ 3–5, 2212–13 ¶¶ 15–18.

From the outset, the Commission designed its LPFM rules to serve the public interest by “fostering a diversity of new voices on the airwaves,” *id.* at 2208 ¶ 4, and “provid[ing] opportunities for new voices to be heard,” *id.* at 2206 ¶ 1; *see also id.* at 2212 ¶ 15 (reciting the Commission’s “goals of encouraging diverse voices on the nation’s airwaves and creating opportunities for new entrants in broadcasting”). These goals are reflected in several important provisions governing the award of LPFM licenses.<sup>1</sup>

To best address local community needs that may be underserved by commercial broadcast stations, the Commission limited eligibility for LPFM licenses to noncommercial educational organizations. *Id.* at 2213–14 ¶ 17; *see* 47 C.F.R. § 73.853(a). Because LPFM is established as a noncommercial service, it is exempt from the ordinary requirement that broadcast licenses be awarded through competitive bidding, *see* 47 U.S.C.

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<sup>1</sup> The FCC employs a two-stage licensing process for LPFM stations. A station must first obtain a construction permit, which authorizes the station to construct its facility. 47 C.F.R. § 73.3533. Once the facility is constructed, the station must then apply for a “license to cover” the permit. *Id.* § 73.3536. For simplicity, this brief refers to applications for a construction permit as “license” applications, as the construction permit is a precursor to the receipt of a license.

§§ 309(j)(2), 397(6); *LPFM First Report & Order*, 15 FCC Rcd. at 2213 ¶ 18, and from the associated FCC regulations that restrict communications or collaboration among auction bidders, *see Order* n.9 (JA238) (discussing 47 C.F.R. § 1.2105(c)).

In place of competitive bidding, the Commission determined that mutually exclusive (MX) license applications should be resolved using a point system designed to promote public-interest goals. *LPFM First Report & Order*, 15 FCC Rcd. at 2258–59 ¶¶ 136–137. Under the current version of the point system, each applicant is awarded up to six points based on criteria such as whether the applicant has an established community presence, whether its programming will be locally originated, and whether it owns an attributable interest in any other broadcast station. 47 C.F.R. § 73.872(b); Fifth Order on Recon. & Sixth Report & Order, *Creation of a Low Power Radio Service*, 27 FCC Rcd. 15402, 15459–73 ¶¶ 161–191 (2012) (*LPFM Sixth Report & Order*).

If the point system results in a tie between two or more applicants, the tied applicants (who are designated “tentative selectees”) are given 90 days to attempt to resolve the tie through voluntary time-sharing. 47 C.F.R. § 73.872(c). If any group of two or more tied applicants submits a time-sharing agreement, those applicants’ points will be aggregated to

calculate a new point total that is then assigned to the group. *Ibid.* This point-aggregation rule is designed to promote time-sharing arrangements, because time-sharing “increas[es] participation by a variety of local community organizations in the operation of LPFM stations” and “increas[es] the number of new broadcast voices.” *LPFM First Report & Order*, 15 FCC Rcd. at 2263 ¶¶ 147–148. Allowing time-sharing applicants to aggregate points thereby serves the public interest by “promoting additional diversity in radio voices and program services.” *Id.* ¶ 148; *see also LPFM Sixth Report & Order*, 27 FCC Rcd. at 15473–75 ¶¶ 192–195 (reaffirming the Commission’s point-aggregation rules).<sup>2</sup>

## **B. Factual Background**

This case arises out of several competing applications to construct and operate an LPFM station near Philadelphia, Pennsylvania, all filed during an application window in late 2013. As the application window approached, the FCC’s Media Bureau took several measures to allow prospective applicants to communicate with Bureau staff on an informal

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<sup>2</sup> If a tie remains following the submission of any time-sharing agreements, the three tied applicants with the longest established local community presence will be subject to involuntary time-sharing and assigned an equal number of hours per week. 47 C.F.R. § 73.872(d). That rule is not at issue in this case.

basis. These measures included interactive webinars; a specially designated phone number and email address; and a blog post appearing on the FCC's website.

The blog post, authored by William T. Lake, the Chief of the Media Bureau, announced an upcoming webinar during which online participants could interact with Bureau staff; offered “reminders and highlights on” some of the pertinent rules governing LPFM applications; and invited prospective applicants to contact Bureau staff by phone or email if they had any questions. See Bill Lake, *Updated: The Low Power FM Application Window is Fast Approaching*, FCC Blog (Oct. 21, 2012, 3:13 pm), <https://www.fcc.gov/news-events/blog/2013/10/21/updated-low-power-fm-application-window-fast-approaching> (*Staff Blog Post*), reprinted at JA16–18. In the course of its discussion, the *Staff Blog Post* addressed two specific issues that might arise during the application process:

Third, we will permit organizations in a community to work together to file a single Form 318 application. Alternatively, organizations in a community could apply separately—for the same or different frequency—knowing that they may decide later to aggregate points so they can negotiate a time-share agreement if the Commission determines that they are tied with the highest point total in the same mutually exclusive group. \* \* \*

Fourth, please bear in mind that it is the *specified* applicant on the application who must intend to carry out the station construction and operation described in the application. Therefore, multiple groups should not attempt to maximize the chances of receiving an LPFM construction permit by submitting multiple applications under the different groups' names with a prior understanding that the groups will later share time or ownership with each other if just one applicant succeeds in getting a construction permit. If this prior understanding does exist, then all the applicants must be listed as parties to the application, and only one application can be filed (our rules only allow for one application per organization). The FCC requires applicants to be truthful when listing all the parties that have control over the applicant entity and, in the event the application is granted, would have control over the future LPFM station. \* \* \*

*Staff Blog Post ¶¶ 3–4 (JA16–17).*

Later, in response to inquiries from prospective applicants, the Media Bureau issued a formal Public Notice providing additional guidance. Public Notice, *Media Bureau Provides Further Guidance on the Processing of Form 38 Applications Filed in the LPFM Window*, 28 FCC Rcd. 16366 (Media Bur. 2013) (*LPFM Processing Guidance*). Among other things, the Bureau clarified that “*applicants may communicate with each other at any time* before or after the release of the [list of mutually exclusive applications] to explore options for resolving application conflicts through settlements and/or technical amendments,” including “partial or universal voluntary time-share agreements.” *Id.* at 16367 (emphasis added).

### C. Proceedings Below

1. The FCC published a list of applicants in each mutually exclusive group with the highest point totals—formally known as “tentative selectees”—on September 5, 2014. Public Notice, *Commission Identifies Tentative Selectees in 111 Groups of Mutually Exclusive Applications Filed in the LPFM Window*, 29 FCC Rcd. 10847 (2014) (*Tentative Selectees Notice*), reprinted at JA109–19. For the Philadelphia license, formally designated “MX Group 304,” seven applicants tied for the highest point total with five points each: G-town Radio; Germantown Life Enrichment Center (“Germantown Life”); Germantown United Community Development Corporation (“Germantown United”); Historic Germantown Preserved (“Historic Germantown”); NAACP Social Justice Law Project (“Social Justice Project”); Nueva Esperanza, Inc. (“Esperanza”); and South Philadelphia Rainbow Committee Community Center, Inc. (“South Philadelphia”). *Id.* at 10857 (JA119).<sup>3</sup>

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<sup>3</sup> An eighth applicant, the Inge Davidson Foundation, received only four points because it did not have an established local community presence. *Tentative Selectees Notice*, 29 FCC Rcd. at 10857 (JA119). Because it was not one of the applicants tied for the highest point total, it was not eligible to receive the license or to participate in any time-sharing arrangement.

Once the tentative selectees were announced, these applicants were given 90 days to attempt to resolve any ties by entering into voluntary time-sharing agreements. 47 C.F.R. § 73.872(c); *Tentative Selectees Notice*, 29 FCC Rcd. at 10852 ¶ 7 (JA114). A group of four applicants—G-town Radio, Germantown Life, Germantown United, and South Philadelphia—filed a time-sharing agreement under which they would collectively broadcast a full 168 hours of programming per week. See *Timeshare Agreement* (JA167–84). This group, referred to here as the “Time-Share Applicants,” received a total of 20 points. Esperanza and the Social Justice Project also submitted a time-sharing agreement, under which Esperanza would broadcast for 24 hours per week, the Social Justice Project would broadcast for 12 hours per week, and the station would be silent for the remaining 132 hours in each broadcast week. Together, Esperanza and the Social Justice Project received 10 points.<sup>4</sup> The

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<sup>4</sup> Although Esperanza’s and the Social Justice Project’s individual applications each claimed a “local program origination” point, for which they “pledge[d] to originate locally at least eight hours of programming per day,” 47 C.F.R. § 73.872(b)(2), it appears that their subsequent time-sharing proposal would not have fulfilled those pledges. If the Court remands this matter to the agency, the FCC reserves the right to review whether Esperanza and the Social Justice Project are entitled to all of the points they initially received. See *Tentative Selectees Notice*, 29 FCC Rcd. at 10850 & n.18 (JA112) (“[A]n LPFM applicant may lose

Time-Share Applicants therefore received the highest point total after aggregation.

2. After the tentative selectees were announced, Esperanza filed a petition to deny the applications of G-town Radio, Germantown Life, Germantown United, and Historic Germantown—a group referred to here as the “Germantown Applicants.” The Germantown Applicants overlap with, but differ in part from, the Time-Share Applicants.

Esperanza principally argued that the Germantown Applicants were all acting under the control of G-town Radio, not as independent entities, and alleged that the Germantown Applicants had failed to disclose certain attributable interests in their respective applications. In response, several of the Germantown Applicants stated that they had “work[ed] together at the outset with plans to potentially aggregate points during the Mutually Exclusive (‘MX’) stage,” JA140, but argued that they are each independent entities and were permitted to file separate applications with the goal of aggregating points. They denied Esperanza’s other allegations.

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claimed points, such as the new entrant credit, as a result of changes made after the application filing.”); Instructions for FCC Form 318 § 3(C) (Oct. 2013), *available at* <https://transition.fcc.gov/Forms/Form318/318.pdf> (“Applicants that claim points for this criterion will be required to adhere to their pledges. \* \* \* Applicants that fail to fulfill their pledges will be subject to administrative sanctions \* \* \*.”).

Upon reviewing the evidence, the Media Bureau found that “each of the Germantown Applicants has an independent corporate history and independent board, with no indicia that any of the Germantown Applicants was established as a ‘front’ for another entity.” Letter Order at 5, *LPFM MX Group 304*, Ref. 1800B3-ATS (FCC Media Bur. Jan. 15, 2015) (*Bureau Decision*) (JA188). It observed that one of the Germantown Applicants, Historic Germantown, ultimately “did not participate in” the time-sharing agreement with the other three Germantown Applicants, “whereas South Philadelphia—which is not among the Germantown Applicants—did participate,” which “strongly suggests independent decision-making rather than common control of the Germantown Applicants as a group.” *Ibid.* The Bureau also found that, contrary to Esperanza’s allegations, the Germantown Applicants did not fail to disclose any attributable interests. *Id.* at 5–7 (JA188–90). Esperanza did not ask the Commission to review any of these findings, and it does not challenge them in this Court.

2. In a reply filing, Esperanza argued for the first time that the *Staff Blog Post* established a Commission policy prohibiting applicants from filing separate applications with the goal of arriving at a time-sharing agreement and aggregating points, and that the Germantown

Applicants had violated that policy.

The Bureau explained, however, that “there is no Rule prohibiting LPFM applicants from filing separate applications with the goal of arriving at a timeshare agreement, provided that each applicant remains under separate control and intends to construct and operate the proposed station if its application is granted.” *Bureau Decision 5* (JA188). It disagreed with Esperanza’s claim that the *Staff Blog Post* creates such a rule for two reasons. First, “[c]ontrary to [Esperanza’s] assertion,” the *Staff Blog Post* “in fact specifically approved of” the coordination here, stating that “organizations in a community c[an] apply separately \* \* \* knowing that they may decide later to aggregate points so they can negotiate a time-share agreement if the Commission determines that they are tied with the highest point total[.]” *Bureau Decision 4 & n.21* (JA187) (quoting *Staff Blog Post* ¶ 3 (JA16–17)). Second, even if the *Staff Blog Post* had disapproved of such coordination, it was at most informal staff advice, and “it is well established that informal staff advice is not authoritative and is relied on by applicants at their own risk.” *Id.* n.21 (JA187) (citing, *inter alia*, *Malkan FM Assocs. v. FCC*, 935 F.2d 1313, 1319 (D.C. Cir. 1991)).

3. Esperanza petitioned the Bureau for reconsideration, reiterating its argument that the *Staff Blog Post* established a Commission policy prohibiting LPFM applicants from filing individual applications with the goal of aggregating points.

The Bureau again disagreed, finding that “[t]here is no such policy”; that “the [*Staff Blog Post*]’s language cannot be properly understood as” establishing such a policy; and that “the relevant portion of the Blog Post” in fact expressly approved of such coordination. Letter Order at 4, *LPFM MX Group 304*, Ref. 1800B3-1B (FCC Media Bur. July 16, 2015) (*Bureau Recon. Decision*) (JA217). As before, the Bureau concluded that “no Commission rule prohibits separate organizations from filing separate LPFM applications with the goal of arriving at a time-sharing agreement, provided that each applicant remains under separate control and intends to construct and operate the proposed station if its application is granted.” *Id.* at 3 (JA216) (citing *Bureau Decision 5* (JA188)).

The Bureau also reiterated that the *Staff Blog Post* constituted only the “informal writings of [an] individual[], not [a] formal statement[] of agency policy,” and therefore “would \* \* \* be non-authoritative even had it expressed the proposition [Esperanza] allege[s].” *Ibid.* It rejected Esperanza’s argument that Mr. Lake’s blog post should be deemed

authoritative simply because he serves as the Chief of the Media Bureau, explaining that the “[a]dvice of a Bureau Chief, while that of a high level staffer, remains that of a staffer.” *Id.* n.16 (JA217).

Finally, the Bureau disagreed with Esperanza’s policy argument that pre-application discussions or coordination must be prohibited in order to “eliminat[e] potential gamesmanship in point aggregation.” *Id.* n.17 (JA217). The Bureau explained that the Commission had addressed this very argument in a recent LPFM rulemaking, in which the Commission “acknowledged a commenter concern that point aggregation might lead to gamesmanship[,] but declined to eliminate this very useful settlement tool or to otherwise modify the voluntary time-sharing process.” *Ibid.* (citing *LPFM Sixth Report & Order*, 27 FCC Rcd. at 15474 ¶ 195).

4. Esperanza filed a timely application for review by the Commission, renewing its argument that the Time-Share Applicants violated an alleged Commission policy—articulated in the *Staff Blog Post*—prohibiting LPFM applicants from filing individual applications with the goal of aggregating points. The Commission denied the application for review “for the reasons stated in the *[Bureau] Decision* and the *[Bureau] Reconsideration Decision*.” Mem. Op. & Order, *LPFM MX Group 304*, 30 FCC Rcd. 13983, 13984 ¶ 3 (2015) (*Order*) (JA238). This appeal followed.

## STANDARD OF REVIEW

A court may not overturn agency action unless it is arbitrary, capricious, unsupported by substantial evidence, or contrary to law. *See* 5 U.S.C. § 706(2). “The scope of review under the arbitrary and capricious standard is narrow,” and a court “is not to ask whether [the challenged] regulatory decision is the best one possible or even whether it is better than the alternatives.” *FERC v. Elec. Power Supply Ass’n*, 136 S. Ct. 760, 782 (2016) (internal quotation marks omitted). Instead, “[u]nder this highly deferential standard of review,” the court must “presume[] the validity of agency action and must affirm unless the Commission failed to consider relevant factors or made a clear error in judgment.” *Cellco P’ship v. FCC*, 357 F.3d 88, 93 (D.C. Cir. 2004) (citations omitted).

“Substantial evidence” requires only “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *Schoenbohm v. FCC*, 204 F.3d 243, 246 (D.C. Cir. 2000) (quoting *Consolo v. Fed. Maritime Comm’n*, 383 U.S. 607, 620 (1966)). To prevail, “[t]he Commission need only articulate a rational connection between the facts found and the choice made.” *Rural Cellular Ass’n v. FCC*, 588 F.3d 1095, 1105 (D.C. Cir. 2009) (internal quotation marks omitted).

“An agency’s interpretation of its own regulations is entitled to ‘substantial deference’ and is given ‘controlling weight unless it is plainly erroneous or inconsistent with the regulation.’” *Shieldalloy Metallurgical Corp. v. NRC*, 768 F.3d 1205, 1208 (D.C. Cir. 2014) (quoting *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994)). When an agency interprets its own regulations, “[i]t is well established that an agency’s interpretation need not be the only possible reading of a regulation—or even the best one—to prevail.” *Decker v. Nw. Env’tl. Def. Ctr.*, 133 S. Ct. 1326, 1337 (2013).

## SUMMARY OF THE ARGUMENT

I. This case begins—and largely ends—not with a blog post, as Esperanza would have it, but instead with the Commission’s official regulations and orders governing LPFM applications. And as the agency repeatedly explained below, “no Commission rule prohibits separate organizations from filing separate LPFM applications with the goal of arriving at a time-sharing agreement, provided that each applicant remains under separate control and intends to construct and operate the proposed station if its application is granted.” *Bureau Recon. Decision 3* (JA216) (citing *Bureau Decision 5* (JA188)); *accord Order* ¶ 3 (JA238) (adopting the reasoning of the Bureau decisions).

That holding is both reasonable and correct. Unlike the Commission's rules governing auctions of commercial licenses, nothing in the FCC's rules governing the award of LPFM licenses prohibits applicants from discussing potential time-sharing arrangements before they apply. Indeed, because the Commission's point system may result in ties that can be resolved only through time-sharing, it will often be prudent for prospective applicants to consider possible time-sharing arrangements before deciding to apply for an LPFM license.

Esperanza contends that pre-application discussions violate a supposed Commission policy of promoting an "open negotiating process," but no such policy exists. Instead, the Commission's stated goals for the LPFM service—to increase the number of new broadcast voices and to encourage participation by a variety of local community organizations—are best served by accepting any qualifying time-sharing agreement that fulfills those goals, without dictating how these agreements are to be negotiated. Similarly, Esperanza's concern about the potential for "gamesmanship" through the use of voluntary agreements was considered and rejected by the Commission in a recent LPFM rulemaking. Although the Commission has acknowledged that there is some potential for

gamesmanship under its point system, it has reasonably determined that the current point-aggregation rules provide the most efficient and effective means of fulfilling its overall policy goals.

Finally, if there were any doubt about how to interpret the LPFM rules, the Court should defer to the FCC's reasonable interpretation of its own regulations.

**II.** Unable to identify anything in the Commission's orders or regulations prohibiting applicants from discussing possible time-sharing arrangements or filing individual applications with the goal of aggregating points, Esperanza instead argues that the Commission's position is inconsistent with an informal blog post authored by Media Bureau staff. As the agency explained, however, the *Staff Blog Post* is of no help to Esperanza for several reasons.

**A.** First, Esperanza misreads the blog post, which in fact supports the Commission's position—not Esperanza's. In the paragraph starting with "Third," the *Staff Blog Post* explains that "organizations in a community c[an] apply separately \* \* \* knowing that they may decide later to aggregate points so they can negotiate a time-share agreement." *Staff Blog Post* ¶ 3 (JA16–17). That paragraph specifically authorizes separate

organizations to file individual applications with the goal of arriving at a time-sharing agreement and aggregating points, which is exactly what occurred here.

Esperanza erroneously seeks to rely instead on the paragraph starting with “Fourth,” which applies when separate organizations “submit[] multiple applications under different groups’ names with a prior understanding that the groups will later share time or ownership with each other *if just one applicant succeeds in getting a construction permit.*” *Staff Blog Post* ¶ 3 (JA17) (emphasis added). That paragraph simply forbids agreements that would allow an organization that does *not* qualify as a tentative selectee (and thus is not eligible to receive the license or to participate in any time-sharing arrangement) to nonetheless share in a winning applicant’s airtime. That paragraph does not apply to time-sharing agreements, in which *all* of the parties (not just some of them) are tentative selectees and are all approved as a group.

Correctly understood, the *Staff Blog Post* thus supports the agency’s decision. The “Third” paragraph specifically authorized the alleged coordination here, whereas the “Fourth” paragraph that Esperanza seeks to rely on does not apply here.

**B.** Second, even if Esperanza's reading of the *Staff Blog Post* were correct, it is at most informal staff advice with no binding effect. This Court has made clear that informal staff advice, even when it comes from an FCC insider at an agency-sponsored forum, is not guaranteed to be accurate, and that parties who rely on such staff advice do so at their own risk.

The circumstances here confirm that the *Staff Blog Post* is informal staff advice that was not intended to constitute authoritative agency action and should not engender any reliance. Unlike formal guidance issued by the Commission or the Media Bureau, it contains no discussion of or citation to legal authority, nor any ordering clauses; it is written in an informal style; it does not bear any official reference number, such as the DA-xxxx number typically assigned to actions taken on delegated authority, nor does it contain any official caption or docket number; it is not published in the *FCC Record*, the official reporter for Commission documents; its byline attributes the post to Bill Lake individually, not to the Bureau or the Commission; and it contains no indication that Mr. Lake's statements represented the considered judgment of the Commission. And even if the *Staff Blog Post* could be construed as formal action by the Bureau, that still would not entitle Esperanza to any relief, since this Court has held time and again that the Commission is not bound by Bureau decisions.

C. Finally, Esperanza's argument that, in light of the *Staff Blog Post*, it did not receive "fair notice" of the Commission's reading of its rules is both forfeited and meritless. It is forfeited because Esperanza did not present this argument in the proceedings before the Commission, as required by 47 U.S.C. § 405(a). And it is meritless because Esperanza has not demonstrated that *it* took any action in reliance on the *Staff Blog Post* or that it would have taken a different action if it had notice that its reading was wrong. Instead, Esperanza's argument is that *other applicants* should be penalized for correctly anticipating that the Commission would not agree with Esperanza's interpretation of the FCC's rules. That is not a "fair notice" argument, nor is it a valid objection to the Commission's decision.

### ARGUMENT

Ignoring traditional sources of regulatory authority, Esperanza asks this Court to overrule a Commission order by pointing to an informal blog post written by staff in the FCC's Media Bureau. But it is well established that staff action does not bind the Commission and that parties who rely on informal staff guidance (such as the blog post here) do so at their own risk. And even taking the *Staff Blog Post* into account, Esperanza misreads that post, which in fact *authorized* the Time-Share Applicants to

file individual applications and aggregate points.

Instead, the proper starting point in this case is the Commission's official regulations governing LPFM licenses, *see* 47 C.F.R. §§ 73.801–73.881, and the orders promulgating them.<sup>5</sup> Here, the agency correctly explained that nothing in those regulations or orders prohibits a group of separate applicants from filing individual applications with the goal of arriving at a time-sharing agreement and aggregating points. And even if there were any doubt, the Court should defer to the Commission's reasonable interpretation of its own regulations. The *Order* should therefore be affirmed.

**I. The FCC's LPFM Regulations Do Not Prohibit Separate Organizations From Filing Individual License Applications With The Goal Of Aggregating Points.**

1. The agency's interpretation of its LPFM regulations in this case was both reasonable and correct. As the agency has consistently explained, "no Commission rule prohibits separate organizations from filing separate LPFM applications with the goal of arriving at a time-sharing agreement, provided that each applicant remains under separate

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<sup>5</sup> Thus, the official LPFM application instructions direct applicants to the "current broadcast rules in Title 47 of the Code of Federal Regulations." *See* Instructions for FCC Form 318 (Oct. 2013), *available at* <https://transition.fcc.gov/Forms/Form318/318.pdf>.

control and intends to construct and operate the proposed station if its application is granted.” *Bureau Recon. Decision 3* (JA216) (citing *Bureau Decision 5* (JA188)); accord *Order ¶ 3* (JA238) (adopting the reasoning of the Bureau decisions). Both before the agency and in this Court, Esperanza has been unable to identify any provision in the LPFM rules that provides otherwise.

Under the relevant regulations, if multiple applications are tied for the highest point total, “any two or more of the tied applicants may propose to share use of the frequency by electronically submitting \* \* \* a time-shar[ing] proposal.” 47 C.F.R. § 73.872(c). “Where such proposals include all of the tied applications, all of the tied applications will be [granted as agreed]; otherwise, time-share proponents’ points will be aggregated.” *Ibid.* Nothing in this rule prohibits applicants from discussing potential time-sharing arrangements before they apply or from filing individual applications with the goal of aggregating points.

In this respect, the Commission explained below, the FCC’s LPFM rules stand in stark contrast to its rules for commercial licenses awarded through competitive bidding. *See Order n.9* (JA238). For commercial licenses, the Commission’s competitive bidding rules restrict communications or collaboration among auction bidders. *See* 47 C.F.R.

§ 1.2105(c). LPFM licenses, by contrast, are awarded through a point system rather than competitive bidding, *see LPFM First Report & Order*, 15 FCC Rcd. at 2213 ¶ 18, 2258–60 ¶¶ 136–138, and nothing in the Commission’s rules governing LPFM applications prohibits prospective applicants from discussing potential time-sharing arrangements before they apply. Nor would such a prohibition necessarily be advisable under this system: Because the point system may result in ties that can be resolved only through time-sharing, it will often be prudent for prospective applicants to consider possible time-sharing arrangements before deciding to apply for an LPFM license and pledging to construct and operate a station if selected.

In response, Esperanza points (Br. 24) to only a single regulation, the Multiple Application Rule, which provides that “no other application \* \* \* for a station of the same class to serve the same community” may be filed “by \* \* \* or on behalf of” the “same applicant.” 47 C.F.R. § 73.3520. Here, however, the Bureau determined that each of the Time-Share Applicants operates as an independent entity, with “an independent corporate history and independent board,” and that the evidence “strongly suggests independent decision-making rather than common control,” with

“no indicia that any of the [applicants] was established as a ‘front’ for another entity.” *Bureau Decision 5* (JA188).<sup>6</sup>

On the facts as found, therefore, there was no violation of the Multiple Application Rule. *See Bureau Decision 4–7* (JA187–90). Esperanza did not ask the Commission to review these findings in its application for review, and it is now precluded from challenging them in this Court. *See* 47 U.S.C. § 405(a) (precluding judicial review “where the party seeking such review \* \* \* relies on questions of fact or law upon which the Commission \* \* \* has been afforded no opportunity to pass”).

Esperanza also observes (Br. 6 n.2, 7, 26–27) that the Commission has instructed LPFM applicants not to *submit* any time-sharing agreements to the agency until after the tentative selectees are

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<sup>6</sup> By filing separate applications, rather than a joint application, each separate applicant assumes an independent legal obligation to ensure that it complies with all FCC rules and independently pledges to build and operate the proposed station if its application is granted. A subsequent time-sharing agreement does not merge the individual applicants into a single joint applicant; instead, the parties to a time-sharing agreement “must specify the proposed hours of operation of each time-share proponent,” 47 C.F.R. § 73.872(c)(1)(i), and the FCC regards each applicant as an independent licensee and grants each a separate license. Unlike in a joint application, each party to a time-sharing agreement has exclusive control over its own airtime, and a violation by one licensee (such as broadcasting obscene material) will not subject the other, independent licenses to liability.

announced.<sup>7</sup> This simply reflects that only tentative selectees are eligible to participate in any time-sharing arrangements. *See* 47 C.F.R. § 73.872(c); *Tentative Selectees Notice*, 29 FCC Rcd. at 10852 ¶ 7 (JA114). It would make little sense to allow premature submission of time-sharing agreements that may turn out to be invalid if one of the parties is found ineligible to participate. By contrast, nothing in the Commission’s rules or in any official guidance prohibits prospective applicants from *discussing* possible time-sharing agreements at any time. *Cf. LPFM Processing Guidance*, 28 FCC Rcd. at 16367 (“[A]pplicants may communicate with each other at any time before or after the release of the [list of mutually exclusive applications] to explore options for resolving application conflicts through settlements and/or technical amendments,” including “partial or universal voluntary time-share agreements.”) (emphasis added).<sup>8</sup>

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<sup>7</sup> If applicants attempt to file a time-sharing agreement before the tentative selectees have been announced, the Commission will return the filing and will not aggregate the parties’ points unless they resubmit the agreement after the tentative selectees are announced.

<sup>8</sup> Esperanza’s attempt to distinguish between discussions about what “the parties may decide to do in the future” and discussions “already agree[ing] to \* \* \* share points” (Br. 20) suggests a line—likely unsustainable—between a permissible “plan” and an impermissible “agreement.” Rather than attempt to read the parties’ minds to divine whether an actual “agreement” was formed before the tentative selectees were announced, the FCC refuses to accept the submission of

2. Unable to identify any support in the Commission's LPFM regulations, Esperanza advances several policy arguments (Br. 24–28) for imposing such a rule. In the first place, policy arguments for the adoption of a rule cannot themselves substitute for the lack of such a legally binding rule. In any event, however, the agency reasonably found Esperanza's policy arguments unpersuasive.

According to Esperanza, allowing applicants to discuss possible time-sharing arrangements would violate a supposed Commission policy of promoting an “open negotiating process.” *See, e.g.*, Esperanza Br. 17, 26, 27. This argument fails, however, because “[t]here is no such policy.” *Cf. Bureau Recon. Decision 4* (JA217). If the focus of the LPFM rules were on mandating an open negotiating process, one would expect to find any number of provisions specifying how time-sharing agreements are to be negotiated—but no such provisions exist, and the Commission has never purported to adopt such a policy.

Instead, the Commission has been clear that its goal for the LPFM service is “to foster a program service responsive to the needs and interests

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any time-sharing agreements until after the tentative selectees are announced, thereby making it difficult for applicants to enshrine any plan or agreement before that time.

of small local community groups, particularly specialized community needs that have not been well served by commercial broadcast stations,” by “increasing the number of new broadcast voices” and encouraging participation “by a variety of local community organizations.” *LPFM First Report & Order*, 15 FCC Rcd. at 2213 ¶ 17, 2263 ¶¶ 147–148; see also *id.* at 2206–09 ¶¶ 1–5. The aim is to serve community needs and the public interest, not to impose any particular norms of fair negotiation. And that aim is best served by accepting any qualifying time-sharing agreement that best advances the goals of the LPFM service (as measured by the Commission’s point system), without dictating how those agreements are to be negotiated.<sup>9</sup>

Indeed, Esperanza’s proposed approach would potentially hinder the ability of the LPFM service to satisfy these goals. On Esperanza’s view, once the tentative selectees are announced, “they must all scramble and negotiate to create an alliance with the most total points” within a limited

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<sup>9</sup> Here, for example, the Time-Share Applicants have agreed to share time, equipment, and facilities and to carry programming from four separate community organizations. Refusing to accept that agreement could result in the station instead being awarded to others who may be less able to work effectively together and who are likely to bring fewer community voices to the airwaves. That result would frustrate the public-interest goals that LPFM service was designed to serve.

90-day window. Esperanza Br. 28 n.5. That approach is not likely to be optimal, because the disparate coalitions formed by such a “scramble” may result in time-sharing arrangements that are less stable and combine groups that have difficulty working together. *Cf. LPFM Sixth Report & Order*, 27 FCC Rcd. at 15474 ¶ 195 (“We are doubtful that a group of unaffiliated applicants with different formats, budgets and levels of experience would work together to operate a station \* \* \* as successfully as a group of applicants that have voluntarily agreed to share time.”). By contrast, allowing local community groups that already know one another to discuss possible time-sharing arrangements before applying, as the Germantown Applicants did here, is likely to result in more stable and successful time-sharing agreements that can serve the community more effectively.

Esperanza also objects that allowing applicants to discuss possible time-sharing arrangements before applying would violate Commission policies “discouraging gamesmanship.” *See* Esperanza Br. 25–27. As the agency explained, however, this objection “is undermined by the Commission’s formal statements on a similar topic” in its most recent LPFM rulemaking. *Bureau Recon. Decision* n.17 (JA217) (citing *LPFM*

*Sixth Report & Order*, 27 FCC Rcd. at 15474 ¶ 195). In that proceeding, a commenter argued that the Commission’s time-sharing rules “invite[] the potential for abuse” because “dominant applicants can effectively ‘squeeze out’ other applicants. *LPFM Sixth Report & Order*, 27 FCC Rcd. at 15474 ¶ 194. In response, “the Commission acknowledged \* \* \* that point aggregation might lead to gamesmanship,” but “declined \* \* \* to eliminate this very useful settlement tool or to otherwise modify the voluntary time-sharing process.” *Bureau Recon. Decision* n.17 (JA217).

Thus, although the Commission is “cognizant of the potential for gamesmanship” through time-sharing agreements, it has nonetheless found that its current point-aggregation rules remain “one of the most efficient and effective means of resolving mutual exclusivity among tied LPFM applicants.” *LPFM Sixth Report & Order*, 27 FCC Rcd. at 15474 ¶ 195; *see also LPFM Recon. Order*, 15 FCC Rcd. at 19247 ¶ 99 (dismissing a similar gamesmanship objection because “[w]e believe that the benefit of bringing more voices to the radio service outweighs any disadvantages of the time-sharing approach”); *cf. LPFM First Report & Order*, 15 FCC Rcd. ¶ 138 (discussing the administrative advantages of the point system adopted by the Commission). In short, the Commission was entitled to

balance concerns about gamesmanship against other competing goals and to reasonably conclude that it would not be in the public interest to modify its rules or to prohibit prospective applicants from discussing possible time-sharing arrangements.

In any event, far from “highlight[ing] why [a] ban on pre-arranged points sharing is critical,” the “facts of this case” (Esperanza Br. 25–26) instead indicate that Esperanza’s concerns about gamesmanship are overstated. Esperanza contends that the Germantown Applicants “virtually ensured they would win the license from the outset.” *Ibid.* But it was in fact a *different* group that won—the Time-Share Applicants, who include a non-Germantown organization (South Philadelphia) and exclude one of the Germantown Applicants (Historic Germantown). *See Bureau Decision 5* (JA188); *see also* JA211 (recounting negotiations between South Philadelphia and the other applicants). Because time-sharing agreements are not accepted by the Commission until after the tentative selectees are announced, it will always be possible for applicants to reconsider any earlier plans and negotiate new agreements at that time, making any attempt at gamesmanship difficult to sustain.

3. Finally, if there were any doubt about how to apply the LPFM rules, the Court should defer to the FCC's reasonable interpretation of its own regulations. Determining which interpretation of the FCC's LPFM regulations best comports with its underlying public-interest goals is precisely the kind of policy question that is best answered by the agency.<sup>10</sup>

Under the Supreme Court's decision in *Auer v. Robbins*, 519 U.S. 452 (1997), "[a]n agency's interpretation of its own regulations is entitled to 'substantial deference' and is given 'controlling weight unless it is plainly erroneous or inconsistent with the regulation.'" *Shieldalloy Metallurgical Corp. v. NRC*, 768 F.3d 1205, 1208 (D.C. Cir. 2014); *see, e.g., Minn. Christian Broad., Inc. v. FCC*, 411 F.3d 283, 284–87 (D.C. Cir. 2005). None of the recognized exceptions to *Auer* deference applies here, because "there is no indication that [the agency's] current view is a change from prior practice or a *post hoc* justification adopted in response to litigation." *Decker v. Nw. Env'tl. Def. Ctr.*, 133 S. Ct. 1326, 1337 (2013). Rather, "[t]he agency has been consistent in its view" every time it has been confronted

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<sup>10</sup> *See, e.g., City of Arlington v. FCC*, 133 S. Ct. 1863, 1873 (2013) ("archetypal *Chevron* questions, about how best to construe an ambiguous term in light of competing policy interests," are best resolved by agencies); *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 865–66 (1984) (similar).

with the issue, *id.* at 1337–38, and has adopted a general rule that applies to all LPFM applications, not just to this litigation.

Even if *Auer* deference were not warranted, the FCC’s position still would be entitled to “a measure of deference proportional to \* \* \* it[s] power to persuade.” *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2168–69 (2012) (internal quotation marks omitted). And here, for the reasons already discussed, the agency’s interpretation is both reasonable and persuasive.

## **II. The *Staff Blog Post* Does Not Preclude The Commission From Applying Its LPFM Regulations Here.**

Lacking any support in traditional sources of legal authority, Esperanza principally contends that the Commission’s interpretation of its rules to permit pre-application discussions is precluded by certain statements in the *Staff Blog Post*. That contention fails for several reasons. First, Esperanza misreads the blog post, which in fact supports the Commission’s position—not Esperanza’s. Second, even if the *Staff Blog Post* read as Esperanza contends, it would not help Esperanza because the blog post is informal staff advice that does not bind the Commission. And third, to the extent Esperanza can raise a fair-notice argument—even though it forfeited the argument by failing to raise this issue before the

Commission—that argument fails because Esperanza cannot show that it took any action in reliance on the *Staff Blog Post* or that it would have taken a different action if it had notice that its reading was wrong.

**A. The *Staff Blog Post* Supports The Commission’s Decision.**

1. Esperanza’s attempt to rely on the *Staff Blog Post* fails first and foremost because that post, when read correctly, in fact supports the Commission’s decision here.

As the agency explained below, the *Staff Blog Post* “in fact specifically approved of” separate organizations filing coordinated applications in the paragraph beginning with “Third.” *See Bureau Decision 4 & n.21* (JA187). According to that paragraph, “organizations in a community c[an] apply separately \* \* \* knowing that they may decide later to aggregate points so they can negotiate a time-share agreement if the Commission determines that they are tied with the highest point total in the same mutually exclusive group.” *Staff Blog Post* ¶ 3 (JA16–17). That, the agency found, is exactly what happened here. *See Bureau Decision 4 & n.21* (JA187) (concluding that this language “specifically approved of such agreements”); *Bureau Recon. Decision 4* (JA217) (“the fact pattern at issue in the instant proceeding[] is addressed in [this]

portion of the Blog Post”).<sup>11</sup>

Disregarding the “Third” paragraph, Esperanza contends (Br. 19–20) that separate applications by groups that have already discussed aggregating points are prohibited by the paragraph beginning with “Fourth.” That paragraph, which discusses the requirement that applicants disclose all parties who will operate the station if a license is granted, states that “multiple groups should not attempt to maximize the chances of receiving an LPFM construction permit by submitting multiple applications under the different groups’ names with a prior understanding that the groups will later share time or ownership with each other *if just one applicant succeeds in getting a construction permit.*”<sup>12</sup> *Staff Blog Post* ¶ 4 (JA17) (emphasis added). As the agency explained, and as the

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<sup>11</sup> Esperanza sometimes characterizes the Germantown Applicants as having entered into an actual “agreement” to share time and aggregate points, rather than just having a plan or intent to do so. *See, e.g.*, Esperanza Br. 14, 16, 24, 25–26. That is inconsistent with the record here, which shows that the Time-Share Applicants are not identical to the Germantown Applicants, and thus that the time-sharing agreement was not finalized until later. *See Bureau Decision* 5 (JA188). According to several of the Germantown Applicants, they simply “work[ed] together at the outset with *plans to potentially aggregate points* during the Mutually Exclusive (‘MX’) stage.” JA140 (emphasis added).

<sup>12</sup> At several points, Esperanza’s brief misleadingly omits the italicized language without any notation that it has altered or truncated the quotation. *See, e.g.*, Esperanza Br. 1, 19, 30.

italicized language demonstrates, this passage is “directed at circumstances where \* \* \* [an] applicant with the most points \* \* \* has previously committed to allow others to share time even if the others would be eliminated due to fewer points or other problems.” *Bureau Recon. Decision 4* (JA217); *see also Bureau Decision n.21* (JA187). That is not what happened here.

Put differently, the “Fourth” paragraph simply forbids agreements that would allow an organization that is not a tentative selectee to “piggyback” on a winning applicant and share in its airtime, even though only tentative selectees are eligible to receive a license or to participate in any time-sharing arrangement. *See Staff Blog Post ¶ 4* (JA17). This reading accords with the rest of the paragraph, which addresses the requirement that applicants must “be truthful when listing all the parties that have control over the applicant entity and, in the event the application is granted, would have control over the future LPFM station.” *Ibid.* If an applicant is participating in an agreement that would allow another party to share some of the applicant’s airtime even if the other party is not selected as one of the licensees, this paragraph explains, then that party must be disclosed on the application. No similar disclosure is necessary for applicants contemplating time-sharing agreements, in which

all of the parties must be tentative selectees, because each applicant's involvement is associated with its individual application and the applications are granted as a group. *See Bureau Decision n.21 (JA187)*. Thus, both by its plain terms and when viewed in context, this paragraph "cannot be properly understood as pertaining to the aggregation issue" raised here. *Bureau Recon. Decision 4 (JA217)*.

Correctly understood, the two paragraphs address two entirely different situations. The "Third" paragraph addresses (and approves of) time-sharing agreements, which apply only when "all \* \* \* of the \* \* \* [a]pplicants have been identified as tentative selectees and are thus potentially eligible for construction permits." *Bureau Decision n.21 (JA187)*. By contrast, the "Fourth" paragraph warns against a very different type of arrangement, not at issue here, in which an "applicant with the most points \* \* \* has previously committed to allow others to share time *even if the others would be eliminated* due to fewer points or other problems." *Bureau Recon. Decision 4 (JA217)* (emphasis added). The agency thus correctly explained that the "Third" paragraph specifically authorized the alleged coordination here and that the "Fourth" paragraph does not apply.

2. Esperanza resists this straightforward reading of the “Fourth” paragraph because that paragraph refers to “attempt[s] to maximize the chances of receiving” a license. According to Esperanza, that paragraph cannot be limited to piggybacking agreements because, it contends, there are no scenarios in which a piggybacking agreement would “maximize the chances” of receiving a license. *See* Esperanza Br. 21–23. That contention stems from Esperanza’s belief that “the applicants know how many points they will receive, and they know how many points their competitors will receive,” and that an applicant anticipating a high score “will have no incentive to enter into an agreement to share time with other (non-winning) entities” when it knows “it could win itself outright.” *Id.* at 22–23. But this argument rests on multiple flawed premises.

To begin with, contrary to Esperanza’s assertion that “the awarding of points is a mechanistic process” in which “each party knows \* \* \* how many points it will ultimately be awarded” (Br. 22 n.4), in reality point claims are often disputed. During the late-2013 application window at issue here, for example, the Commission rejected dozens of point claims for a host of different reasons. *See Tentative Selectees Notice*, 29 FCC Rcd. at 10850–51 & nn.19–22 (JA112–13); *see also id.* at 10851 (JA113) (“In cases where an applicant claimed points, but failed to satisfy the respective

requirements for receipt of such points, Attachment A lists the points claimed followed in parenthesis by the points credited.”). Similarly, when a series of disputes over point scores for competing LPFM applicants in Baltimore in the same filing window were appealed to the Commission, the Commission affirmed the Bureau’s determination of one applicant’s point score but reversed the Bureau’s determination of another applicant’s score. See Mem. Op. & Order, *LPFM MX Group 198*, 30 FCC Rcd. 10540 (2015) (*Baltimore LPFM Order*). Esperanza is therefore incorrect that point scores are always a simple and predictable matter.<sup>13</sup>

Other uncertainties abound. For example, many applicants who believe that they satisfy all requirements (as there would otherwise be no reason to apply) nonetheless see their applications dismissed for technical reasons. Indeed, as Esperanza itself observes (Br. 26), there were originally 11 applications for the Philadelphia license at issue here, but only 8 of them were deemed technically acceptable and received point scores. Compare Public Notice, *Media Bureau Identifies Mutually Exclusive Applications Filed in the LPFM Window*, 28 FCC Rcd. 16713,

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<sup>13</sup> Another dispute over point scores for LPFM applications filed in the late-2013 filing window, involving competing applicants in San Francisco (LPFM MX Group 37), is currently pending before the Commission.

16741 (Media Bur. 2013) (*Mutually Exclusive LPFM Applications*), with *Tentative Selectees Notice*, 29 FCC Rcd. at 10862 (JA119). Similarly, even if a prospective applicant somehow knew the identities of all other applicants before applying—even though applicants’ identities are not publicly disclosed during the filing period—the applicant still cannot be certain which other applicants will be in its MX group. Ascertaining mutual exclusivity is a complex engineering determination that may be beyond the abilities of most LPFM applicants. And mutual exclusivity can sometimes flow in long and unexpected “daisy chains”;<sup>14</sup> for example, even though the minimum distance between LPFM transmitters is only 24 kilometers, 47 C.F.R. § 73.807(a)(1) tbl., the applicants here were mutually exclusive with an applicant in Somerdale, New Jersey, more than 24 kilometers from Germantown, see *Mutually Exclusive LPFM Applications*, 28 FCC Rcd. at 16741.

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<sup>14</sup> Mutual exclusivity determinations are transitive, so if A is mutually exclusive to B, and B is mutually exclusive to C, then A and C will both be included in the same MX group (along with B), even in situations where A and C are not located near each other and would not be mutually exclusive if B had not applied. See Mem. Op. & Order, *Reexamination of the Comparative Standards for Noncommercial Educational Applicants*, 16 FCC Rcd. 5074, 5104–05 ¶¶ 89–90 (2001) (*NCE Comparative Standards Recon. Order*).

Contrary to Esperanza's claims, therefore, LPFM applicants often confront incomplete information at the application stage. Given these uncertainties, even an applicant that expects to receive the sole high score could wish to hedge its bets by entering into mutual piggybacking agreements with one or more other applicants—if the Commission's rules did not forbid it. Although this may not appear to “maximize the chances” of receiving a license when viewed in hindsight after all point totals and disqualifications are known, from the more limited information known at the time of filing it can increase the chances that the applicant will receive at least a share of the station's airtime.

Esperanza is also incorrect in assuming (Br. 23) that an applicant who “could win \* \* \* outright” would never be interested in partnering with other applicants. On the contrary, even an applicant that could win sole control of a station may nevertheless wish to partner with others to help defray its operating costs or to produce additional programming to fill unused airtime. *See LPFM First Report & Order*, 15 FCC Rcd. at 2263 ¶ 148 (“In many cases, the small scale of LPFM operations also may make time-sharing more efficient for LPFM licensees.”); *see also LPFM Recon. Order*, 15 FCC Rcd. at 19247 ¶ 99 (“We understand that an applicant will have the incentive to propose time-sharing even if it could provide full-day

programming in order to maximize its points and increase the likelihood it will be selected.”).

Esperanza’s attack on the agency’s reading of the *Staff Blog Post* is therefore unsound. Instead, as the agency correctly explained, the *Staff Blog Post* is best read to support the agency’s decision here.

**B. Even If The *Staff Blog Post* Were To The Contrary, It Would Not Bind The Commission.**

1. Even if Esperanza’s reading of the *Staff Blog Post* were correct, it would not help Esperanza here because the blog post is at most informal staff advice with no binding effect that should engender any reliance. As the agency explained, “[b]logs are by their very nature informal writings of individuals, not formal statements of agency policy” and are therefore “non-authoritative.” *Bureau Recon. Decision* 4 (JA217); see also *Order* ¶ 3 (JA238) (“[A]s the Bureau noted, the LPFM Blog Post is informal staff advice and not authoritative.”).

This Court has held that such informal staff advice—even if it comes from “an FCC insider” presenting at an “official” forum sponsored by the agency—is not guaranteed to be accurate and “should not engender reliance.” *Malkan FM Assocs. v. FCC*, 935 F.2d 1313, 1319 (D.C. Cir. 1991) (R.B. Ginsburg, J.). That holding controls this case. As the Bureau

correctly explained, even if the *Staff Blog Post* read as Esperanza contends, “it is well established that informal staff advice is not authoritative and is relied on by applicants at their own risk.” *Bureau Decision* n.21 (JA187) (citing *Malkan*); accord *Bureau Recon. Decision* n.16 (JA217).

Esperanza fails to seriously engage with this Court’s decision in *Malkan*. In just two sentences (Br. 34), it attempts to dismiss that case as involving a “slip” by “a single staff person” (or merely “an official”) “whose position is unknown.” But none of those factors meaningfully distinguishes *Malkan* from the facts here. Like in *Malkan*, the byline of the *Staff Blog Post* lists only “a single staff person.” Although the precise title of the speaker in *Malkan* is not known, the Court identified him not just as “an official,” but as “an FCC insider,” 935 F.2d at 1319—a description would likewise fit Mr. Lake. And the “slip” in *Malkan* was not an isolated misstatement during extemporaneous remarks, but was instead erroneous information included in a prepared list of fifteen factors discussed by the official at a Commission-sponsored seminar. *Id.* at 1317.<sup>15</sup>

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<sup>15</sup> Esperanza notes (Br. 34) that, elsewhere in its opinion in *Malkan*, the Court observed that the agency had previously spoken to the matter in question, whereas here the *Staff Blog Post* is supposedly “the Commission’s only pronouncement on the issue.” But nothing in *Malkan* suggests that, if an agency has not yet spoken to an issue, then any informal remarks by agency staff—be it at a conference, in an

Looking past *Malkan*, Esperanza identifies only a single case—*Alaska Professional Hunters Ass’n v. FAA*, 177 F.3d 1030, 1034–35 (D.C. Cir. 1999), *abrogated by Perez v. Mortg. Bankers Ass’n*, 135 S. Ct. 1199 (2015)—as supposedly holding that “staff advice to regulated parties may constitute an ‘authoritative’ agency position.” Esperanza Br. 33. But *Alaska Professional Hunters* was expressly abrogated by the Supreme Court’s decision in *Perez*,<sup>16</sup> and even if it remained good law on this point,

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informal blog post, or over the phone—become official and binding pronouncements until the agency says otherwise. Such a rule would have a severe chilling effect on the “informal communications between agencies and their regulated communities \* \* \* that are vital to the smooth operation of both government and business.” *Indep. Equip. Dealers Ass’n v. EPA*, 372 F.3d 420, 428 (D.C. Cir. 2004). Rather, *Malkan*’s holding that informal staff advice “should not engender reliance,” 935 F.2d at 1319, is not conditioned on whether the agency has previously spoken to an issue. In any event, the *Staff Blog Post* here sought to offer only “reminders and highlights” about the Commission’s existing rules; it did not purport to speak to any matters not previously addressed by the Commission. *See Staff Blog Post* (JA16).

<sup>16</sup> *Alaska Professional Hunters*’s “analysis \* \* \* draws on *Paralyzed Veterans of America v. D.C. Arena*, 117 F.3d 579, 586 (D.C. Cir. 1997),” which held that once an agency has interpreted one of its regulations, it may not depart from that interpretation except through notice-and-comment rulemaking. 177 F.3d at 1033–34. The court thus reasoned, relying on *Paralyzed Veterans*, that once staff advice had become sufficiently entrenched, regulated parties were entitled to treat that advice as binding because it could not be changed without notice and comment. *See id.* at 1035–36. In *Perez*, however, the Supreme Court disagreed with that approach and overruled *Paralyzed Veterans* and its

it is readily distinguishable. In that case, the court emphasized that the FAA's regional office had been consistently advising pilots for more than 30 years to follow a particular view of its regulations; that the FAA had been aware of that advice and of pilots' reliance on it; and that the FAA for many years took no steps to disavow the advice. *See* 177 F.3d at 1035–36. Under those circumstances, the court found that the agency's knowing acquiescence had effectively ratified the regional office's advice as the agency's own official view—"an authoritative departmental interpretation, an administrative common law applicable to Alaskan guide pilots." *Id.* at 1035; *cf. Christopher*, 132 S. Ct. at 2168 (treating new agency interpretation as a change from its prior position, even though the agency had not previously promulgated any official interpretation, because "despite the industry's decades-long practice \* \* \*, the [agency] never initiated any enforcement actions \* \* \* or otherwise suggested that it thought the industry was acting unlawfully").

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progeny, including specifically *Alaska Professional Hunters*. *See* 135 S. Ct. at 1206–09. Consequently, *Alaska Professional Hunters's* conclusion that certain longstanding and entrenched staff guidance can be treated as binding and entitled to reliance no longer appears to be good law following *Perez*.

In other words, *Alaska Professional Hunters* (to the extent it remains good law) did not hold that staff advice is itself authoritative, but instead held that the staff advice in that case had effectively been adopted as the view of the agency itself, and an agency's *own* position is generally authoritative. Indeed, the court took care to include a disclaimer stating that “when a local office gives an interpretation of a regulation or provides advice to a regulated party, this will not necessary constitute an authoritative administrative position” under normal circumstances. 177 F.3d at 1035 (citing, *inter alia*, *Drummond Coal Co. v. Hodel*, 796 F.2d 502, 508 (D.C. Cir. 1986); *N.Y. State Dep’t of Soc. Servs. v. Bowen*, 835 F.2d 360, 365–66 (D.C. Cir. 1987)); *cf. United States v. Mead Corp.*, 533 U.S. 218, 222–24, 231–34 (2001) (“ruling letters” issued by individual Customs offices, despite regulation providing that such letters “represent[] the official position of the Customs Service with respect to the particular transaction or issue described therein and [are] binding on all Customs Service personnel,” need not be treated as authoritative).

The other cases Esperanza cites as support for treating the *Staff Blog Post* as authoritative (Br. 28–37) all concern a different, inapposite question. Those cases address whether various official pronouncements issued by an agency were effectively binding on regulated entities (and

thus constituted legislative or interpretive rules, rather than unreviewable statements of policy or non-final action). *See, e.g., CropLife Am. v. EPA*, 329 F.3d 876, 881–84 (D.C. Cir. 2003); *Gen. Elec. Co. v. EPA*, 290 F.3d 377, 381–85 (D.C. Cir. 2002); *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1020–23 (D.C. Cir. 2000). The question here, by contrast, is whether informal advice by a staff member constitutes an official pronouncement of the Commission. The cases invoked by Esperanza offer no help on this question.

Indeed, as one of Esperanza’s own authorities makes clear (*see* Br. 32), “a definitive and binding statement on behalf of the agency must come from a source with the authority to bind the agency.” *Devon Energy Corp. v. Kempthorne*, 551 F.3d 1030, 1040 (D.C. Cir. 2008). Yet Bill Lake, as an individual, has no power to bind the Commission. It is true that Mr. Lake serves as Chief of the Media Bureau, and that the Media Bureau in certain circumstances has delegated authority to act on behalf of the agency. But the byline of the *Staff Blog Post* attributes the post to Mr. Lake individually—not to the Bureau or the Commission. And as the agency explained below, the individual “[a]dvice of a Bureau Chief, while that of a high level staffer, remains that of a staffer.” *Bureau Recon. Decision* n.16 (JA217).

2. Other aspects of the *Staff Blog Post* confirm that it is only informal staff advice and was not intended to constitute formal agency action that should engender any reliance:

- Unlike formal Bureau guidance, the *Staff Blog Post* is written in an informal style and contains no discussion of or citations to any legal authority; nor, unlike a Bureau order, does it contain any ordering clauses.
- Unlike most formal agency actions, the *Staff Blog Post* does not bear any official reference number, such as the DA-xxxx number typically assigned to actions taken on delegated authority, nor does it contain any official caption or docket number.
- Unlike most official agency releases, the *Staff Blog Post* is not published in the *FCC Record*, the official reporter for FCC documents.
- Unlike most official actions, the *Staff Blog Post's* byline attributes the post to Mr. Lake individually, not to the Bureau or the Commission.
- Unlike official FCC interpretations, the *Staff Blog Post* contains no indication that Mr. Lake's statements represent the considered judgment of the Commission.

Against all this, Esperanza points (Br. 30) only to purportedly “mandatory language \* \* \* aimed at regulated entities.” On inspection, however, Esperanza grossly overstates these supposed mandates. For one thing, the *Staff Blog Post* does *not* purport to be creating or announcing any new or independent duties not already found in the Commission's rules. Instead, by its own terms, it seeks only “to give you \* \* \* reminders

and highlights” about what is already required under the existing rules. *See Staff Blog Post* (JA16). For another, many of the provisions Esperanza points to are actually *permissive*, describing what applicants may do, rather than *mandates* dictating what applicants must (or must not) do.

The *Staff Blog Post* is therefore nothing like the “ukase” in *Appalachian Power*, 208 F.3d at 1028, on which Esperanza seeks to rely (Br. 31). It does not predominantly “command[],” “order[],” and “dictate[].” 208 F.3d at 1028. Rather, it *describes* what the existing rules provide, *permits* applications to be filed by many different entities, and *invites* applicants to contact the Bureau with any questions. This is no “ukase.” *See Cement Kiln Recycling Coal. v. EPA*, 493 F.3d 207, 227–28 (D.C. Cir. 2007).

By comparison, when the Media Bureau wishes to issue formal guidance, it generally does so by issuing a formal Public Notice. Indeed, it later did just that here, “respond[ing] to many inquiries” by issuing the *LPFM Processing Guidance*. *See* 28 FCC Rcd. at 16366. Many of the inquiries answered there were solicited through the *Staff Blog Post*, which invited prospective applicants to “please contact Bureau staff” by phone or email with any questions. *See* JA17–18. The *Staff Blog Post* (along with other outreach measures such as the interactive webinars) thus served as

a *starting point* for applicants to seek formal guidance, not as formal guidance itself. If the *Staff Blog Post* were intended to serve as authoritative guidance, as Esperanza contends, then it would look like the *LPFM Processing Guidance*—not like a blog post.

3. Even if the blog post constituted formal Bureau guidance rather than informal staff advice, that still would not entitle Esperanza to any relief, because Bureau guidance and orders cannot bind the Commission.

Although formal Bureau orders, issued on delegated authority, are binding upon regulated entities, this Court has repeatedly held that even formal Bureau orders do not bind *the Commission*. See, e.g., *Comcast Corp. v. FCC*, 526 F.3d 763, 769 (D.C. Cir. 2008) (“[A] long line of cases in this circuit \* \* \* unambiguously holds that an agency is not bound by unchallenged staff decisions.”); *Am. Tel. & Tel. Co. v. FCC*, 454 F.3d 329, 332 (D.C. Cir. 2006) (staff action does not constitute “authoritative Commission action”); *Vernal Enters., Inc. v. FCC*, 355 F.3d 650, 660 (D.C. Cir. 2004) (“[A]n agency is not bound by the actions of its staff if the agency has not endorsed those actions.”). Indeed, “[t]here is no authority for the proposition that a lower component of a government agency may bind the decision making of the highest level.” *Cnty. Care Found. v. Thompson*, 318 F.3d 219, 227 (D.C. Cir. 2003).

Yet Esperanza now asks effectively asks the Court to hold that the Commission was bound by staff-level action: It argues that the Commission should have been required to deny the Germantown Applicants' applications based on a purported Bureau interpretation of FCC rules, even though the Commission has rejected that interpretation. That would turn the rule that Bureau action cannot bind the Commission on its head. The *Staff Blog Post* cannot preclude the Commission from making its own determinations about how to interpret and apply its LPFM rules.

**C. Esperanza's Fair-Notice Argument Is Both Forfeited And Meritless.**

Finally, Esperanza contends (Br. 37–39) that its “rights were violated because the Commission failed to provide fair notice.” As a threshold matter, Esperanza is barred from raising that issue in this case because it did not present this fair-notice argument to the Commission in its application for review (nor did it raise this issue at any other point before the agency). Under 47 U.S.C. § 405(a), parties may not seek judicial review of any issue “upon which the Commission \* \* \* has been afforded no opportunity to pass.” *See, e.g., FiberTower Spectrum Holdings, LLC v. FCC*, 782 F.3d 692, 696–97 (D.C. Cir. 2015).

In any event, Esperanza's notice argument is meritless, because Esperanza cannot show that it took any action in reliance on the *Staff Blog Post* or that it would have taken a different action if it had notice that its reading was wrong. Esperanza does not contend, for example, that it would not have applied for an LPFM license if it had not misread the *Staff Blog Post*.<sup>17</sup>

Esperanza is therefore incorrect to argue (Br. 38–39) that this case is like *Satellite Broadcasting Co. v. FCC*, 824 F.2d 1 (D.C. Cir. 1987). In that case, the appellant reasonably believed that the Commission's rules required applications to be filed in Washington, but the Commission later interpreted the rules to require applications to be filed in Gettysburg and therefore dismissed the appellant's applications. The appellant was thus able to demonstrate that it took an action in reliance on one interpretation (by filing in Washington) and that it would have taken a different action if it had notice of the Commission's interpretation (by filing in Gettysburg). Esperanza cannot make any such showing here.

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<sup>17</sup> Indeed, the record contains no evidence that anybody at Esperanza in fact saw or read the blog post before applying. Esperanza did not even invoke the blog post in its initial petition to deny, but instead mentioned it for the first time in a reply filing only after the post was cited by other parties in opposition. In any event, the lack of such evidence in the record simply confirms that Esperanza failed to develop and assert its notice argument before the agency.

Unable to point to any action it took based on the *Staff Blog Post*, Esperanza submits that if it had realized its interpretation of the *Staff Blog Post* was wrong, it “would no doubt have attempted to form alliances and negotiate point-aggregation agreements from the outset and could have negotiated itself into a winning point-aggregation and time-sharing arrangement.” *See* Esperanza Br. 38. That speculative theory of reliance is unsupportable here. For one thing, it is directly contrary to Esperanza’s central allegation that the four Germantown Applicants already had a four-member agreement in place prior to applying. Because there were only seven tentative selectees for the Philadelphia license, *Tentative Selectees Notice*, 29 FCC Rcd. at 10857 (JA119), on Esperanza’s own view (*see* Br. 25–26) no alliance among other applicants could have made a difference. For another, the record reveals that Esperanza *did* attempt to negotiate a winning time-sharing agreement—and did so before the Time-Share Applicants reached their agreement—and simply was unsuccessful. Esperanza contacted the Germantown Applicants, but they were uninterested in working with Esperanza. *See* JA132. Esperanza then negotiated with South Philadelphia, and if successful would have prevented the Time-Share Applicants from forming their winning

coalition, but South Philadelphia eventually decided that the Germantown entities would be better partners. *See* JA211.

At bottom, Esperanza's complaint is not that *it* took any action in reliance on the *Staff Blog Post* or that it would not have acted if it had notice that its interpretation was wrong. Instead, Esperanza's complaint is that *others* chose not to rely on Esperanza's incorrect interpretation of the Commission's rules. That is not an argument that Esperanza was deprived of "fair notice," nor is it a valid objection to the Commission's decision.

Because Esperanza cannot show it took any action "that \* \* \* relied on" its reading of the *Staff Blog Post*, this case "has nothing in common with the very limited set of cases in which [courts] have \* \* \* vacated an enforcement action on notice grounds." *Suburban Air Freight, Inc. v. TSA*, 716 F.3d 679, 684 (D.C. Cir. 2013). Instead, Esperanza was entitled to only "an opportunity to press its position in an adversarial hearing"—and that is what it received here. *Ibid.* "Neither the Constitution nor administrative law fair-notice principles require anything more." *Ibid.*

## CONCLUSION

For the foregoing reasons, the Commission's decision should be affirmed.

Dated: June 13, 2016

Respectfully submitted,

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*/s/ Scott M. Noveck*

\_\_\_\_\_  
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I, Scott M. Noveck, hereby certify that on June 13, 2016, I filed the foregoing Brief for Appellee Federal Communications Commission with the Clerk of Court for the United States Court of Appeals for the District of Columbia Circuit using the electronic CM/ECF system and by causing eight paper copies to be mailed to the Clerk of Court by first-class mail. I further certify that all participants in the case, listed below, are registered CM/ECF users and will be served electronically by the CM/ECF system.

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**STATUTORY ADDENDUM**

## STATUTORY ADDENDUM CONTENTS

	<b>Page</b>
47 C.F.R. § 73.872 .....	Add. 2
47 C.F.R. § 73.3520 .....	Add. 6

47 C.F.R. § 73.872 provides:

**§ 73.872 Selection procedure for mutually exclusive LPFM applications.**

(a) Following the close of each window for new LPFM stations and for modifications in the facilities of authorized LPFM stations, the Commission will issue a public notice identifying all groups of mutually exclusive applications. Such applications will be awarded points to determine the tentative selectee. Unless resolved by settlement pursuant to paragraph (e) of this section, the tentative selectee will be the applicant within each group with the highest point total under the procedure set forth in this section, except as provided in paragraphs (c) and (d) of this section .

(b) Each mutually exclusive application will be awarded one point for each of the following criteria, based on certifications that the qualifying conditions are met and submission of any required documentation:

(1) *Established community presence.* An applicant must, for a period of at least two years prior to application and at all times thereafter, have qualified as local pursuant to § 73.853(b). Applicants claiming a point for this criterion must submit any documentation specified in FCC Form 318 at the time of filing their applications.

(2) *Local program origination.* The applicant must pledge to originate locally at least eight hours of programming per day. For purposes of this criterion, local origination is the production of programming by the licensee, within ten miles of the coordinates of the proposed transmitting antenna. Local origination includes licensee produced call-in shows, music selected and played by a disc jockey present on site, broadcasts of events at local schools, and broadcasts of musical performances at a local studio or festival, whether recorded or live. Local origination does not include the broadcast of repetitive or automated programs or time-shifted recordings of non-local programming whatever its source. In addition, local origination does not include a local program that has been broadcast twice, even if the licensee broadcasts the program on a different day or makes small variations in the program thereafter.

(3) *Main studio.* The applicant must pledge to maintain a publicly accessible main studio that has local program origination capability, is reachable by telephone, is staffed at least 20 hours per week between 7 a.m. and 10 p.m., and is located within 16.1 km (10 miles) of the proposed site for the transmitting antenna for applicants in the top 50 urban markets and 32.1 km (20 miles) for applicants outside the top 50 urban markets. Applicants claiming a point under this criterion must specify the proposed address and telephone number for the proposed main studio in FCC Form 318 at the time of filing their applications.

(4) *Local program origination and main studio.* The applicant must make both the local program origination and main studio pledges set forth in paragraphs (b)(2) and (3) of this section.

(5) *Diversity of ownership.* An applicant must hold no attributable interests in any other broadcast station.

(6) *Tribal Applicants serving Tribal Lands.* The applicant must be a Tribal Applicant, as defined in § 73.853(c), and the proposed site for the transmitting antenna must be located on that Tribal Applicant's "Tribal Lands," as defined in § 73.7000. Applicants claiming a point for this criterion must submit the documentation set forth in FCC Form 318 at the time of filing their applications.

(c) *Voluntary time-sharing.* If mutually exclusive applications have the same point total, any two or more of the tied applicants may propose to share use of the frequency by electronically submitting, within 90 days of the release of a public notice announcing the tie, a time-share proposal. Such proposals shall be treated as minor amendments to the time-share proponents' applications, and shall become part of the terms of the station authorization. Where such proposals include all of the tied applications, all of the tied applications will be treated as tentative selectees; otherwise, time-share proponents' points will be aggregated.

(1) Time-share proposals shall be in writing and signed by each time-share proponent, and shall satisfy the following requirements:

(i) The proposal must specify the proposed hours of operation of each time-share proponent;

(ii) The proposal must not include simultaneous operation of the time-share proponents; and

(iii) Each time-share proponent must propose to operate for at least 10 hours per week.

(2) Where a station is authorized pursuant to a time-sharing proposal, a change of the regular schedule set forth therein will be permitted only where a written agreement signed by each time-sharing permittee or licensee and complying with requirements in paragraphs (c)(1)(i) through (iii) of this section is filed with the Commission, Attention: Audio Division, Media Bureau, prior to the date of the change.

(3) Where a station is authorized pursuant to a voluntary time-sharing proposal, the parties to the time-sharing agreement may apportion among themselves any air time that, for any reason, becomes vacant.

(4) Concurrent license terms granted under paragraph (d) of this section may be converted into voluntary time-sharing arrangements renewable pursuant to § 73.3539 by submitting a universal time-sharing proposal.

(d) *Involuntary time-sharing.* (1) If a tie among mutually exclusive applications is not resolved through voluntary time-sharing in accordance with paragraph (c) of this section, the tied applications will be reviewed for acceptability. Applicants with tied, grantable applications will be eligible for equal, concurrent, non-renewable license terms.

(2) If a mutually exclusive group has three or fewer tied, grantable applications, the Commission will simultaneously grant these applications, assigning an equal number of hours per week to each applicant. The Commission will determine the hours assigned to each applicant by first assigning hours to the applicant that has been local, as defined in § 73.853(b), for the longest uninterrupted period of time, then assigning hours to the applicant that has been local for the next longest uninterrupted period of time, and finally assigning hours to any remaining applicant. The Commission will offer applicants an opportunity to voluntarily reach a time-sharing agreement. In the event that applicants cannot reach such agreement, the Commission will require each applicant subject to

involuntary time-sharing to simultaneously and confidentially submit their preferred time slots to the Commission. If there are only two tied, grantable applications, the applicants must select between the following 12-hour time slots 3 a.m.–2:59 p.m., or 3 p.m.–2:59 a.m. If there are three tied, grantable applications, each applicant must rank their preference for the following 8-hour time slots: 2 a.m.–9:59 a.m., 10 a.m.–5:59 p.m., and 6 p.m.–1:59 a.m. The Commission will require the applicants to certify that they did not collude with any other applicants in the selection of time slots. The Commission will give preference to the applicant that has been local for the longest uninterrupted period of time. The Commission will award time in units as small as four hours per day. In the event an applicant neglects to designate its preferred time slots, staff will select a time slot for that applicant.

(3) Groups of more than three tied, grantable applications will not be eligible for licensing under this section. Where such groups exist, the Commission will dismiss all but the applications of the three applicants that have been local, as defined in § 73.853(b), for the longest uninterrupted periods of time. The Commission then will process the remaining applications as set forth in paragraph (d)(2) of this section.

(4) If concurrent license terms granted under this section are converted into universal voluntary time-sharing arrangements pursuant to paragraph (c)(4) of this section, the permit or license is renewable pursuant to §§ 73.801 and 73.3539.

(e) *Settlements.* Mutually exclusive applicants may propose a settlement at any time during the selection process after the release of a public notice announcing the mutually exclusive groups. Settlement proposals must comply with the Commission's rules and policies regarding settlements, including the requirements of §§ 73.3525, 73.3588 and 73.3589. Settlement proposals may include time-share agreements that comply with the requirements of paragraph (c) of this section, provided that such agreements may not be filed for the purpose of point aggregation outside of the 90 day period set forth in paragraph (c) of this section.

47 C.F.R. § 73.3520 provides:

**§ 73.3520 Multiple applications.**

Where there is one application for new or additional facilities pending, no other application for new or additional facilities for a station of the same class to serve the same community may be filed by the same applicant, or successor or assignee, or on behalf of, or for the benefit of the original parties in interest. Multiple applications may not be filed simultaneously.