

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

In re Applications of)
)
SHAW COMMUNICATIONS, INC.) File No. BNPFT-20030825AML
) Facility ID No. 141693
For a New FM Translator Station)
at Berlin, New Hampshire)
)

ORDER ON RECONSIDERATION

Released: June 18, 2012

By the Chief, Media Bureau:

I. INTRODUCTION AND BACKGROUND

1. In this *Order on Reconsideration*, we dismiss the Petition for Reconsideration (“Petition”) filed by Barry P. Lunderville (“Lunderville”), pursuant to Section 1.106(p) of the Commission’s Rules.¹ The Petition seeks reconsideration of the Commission’s Memorandum Opinion and Order in *Shaw Communications, Inc.*²

2. On August 25, 2003, Shaw Communications, Inc. (“Shaw”) filed an application (the “Application”) for a construction permit to build a new, independently owned FM translator station at Berlin, New Hampshire,³ to rebroadcast the signal of Station WVMJ(FM), Conway, New Hampshire.⁴ On January 1, 2004, Lunderville filed a Petition to Deny and Request for Declaratory Ruling (“Petition to Deny”), arguing that: (1) its alternative signal prediction methodology study establishes that Shaw’s proposed translator would not be able to receive a direct off-air signal from primary station WVMJ(FM) due to mountainous terrain between the two stations,⁵ and therefore would be in violation of Section 74.1231(b) of the Rules;⁶ (2) Shaw’s proposed translator would violate Section 74.1235(d) of the Rules

¹ 47 C.F.R. § 1.106(p).

² 24 FCC Rcd 5852 (2009) (“*Shaw Order*”).

³ File No. BNPFT-20030825AML. The translator station has since been constructed and assigned the call sign W251BD.

⁴ WVMJ(FM) is licensed to Mt. Washington Radio & Gramophone, L.L.C. (“Mt. Washington”).

⁵ See 47 C.F.R. § 73.313(e) (permitting supplemental prediction showings where terrain in one or more directions from transmitter site departs widely from the average elevation).

⁶ *Id.*, § 74.1231(b).

by failing to operate at reduced power within 320 kilometers of the Canadian border; and (3) grant of Shaw's Application would be contrary to Commission policy, as it would directly compete with full-service broadcast stations. In his Petition to Deny, Lunderville also requested a declaratory ruling with respect to the Commission's translator policies and rules. On January 5, 2005, the Bureau denied the Petition to Deny and granted the Application.⁷ Lunderville timely filed an Application for Review and a Motion for Stay. The Commission denied both the Application for Review and Motion for Stay in the *Shaw Order*.⁸ Lunderville timely filed the Petition.

II. DISCUSSION

3. In his Petition, Lunderville contends that reconsideration is warranted under Section 1.106(b)(2) of the Rules, because he alleges facts that occurred since his last opportunity to present them. However, a close reading of the Petition shows this is not the case.

4. First, Lunderville argues that the Commission failed to follow its own Rules in paragraphs 5 and 7 of the *Shaw Order*,⁹ when the Commission rejected Lunderville's contentions that it should have calculated the signal of primary station WVMJ(FM) using alternative signal prediction methodology under Section 73.313(e) of the Rules,¹⁰ and that it should use the standard in Section 74.1235(d) of the Rules, rather than that in Section 74.1235(d)(3),¹¹ in determining the allowable power of Shaw's proposed translator station.¹² According to Lunderville, “[t]he Commission's failure to follow its own rules is a new fact that occurred after the filing of Lunderville's application for review and it would be in the public interest to reconsider this matter.”¹³ This mischaracterizes the standard set forth in Section 1.106(b)(2), which states that a petition for reconsideration of the denial of an application for review will be entertained only when the petition, *inter alia*, relies on facts or arguments that relate to events which have occurred since the last opportunity to present such matters to the Commission.¹⁴ Clearly, however, the “event” of the Commission's rejection of a previously raised argument does not satisfy this requirement, since of necessity the Commission's order in any case will have been released after the aggrieved party was last able to present its arguments in pleadings. To adopt Lunderville's position would be to hold that the Commission must entertain petitions for reconsideration of *all* its orders, casting it into a Möbius loop of orders and petitions for reconsideration that could never reach finality. Section 1.106(b)(2) plainly does not contemplate such a result.

5. Instead, under the guise of new “facts,” Lunderville merely re-argues points that he presented to the Commission in his Application for Review, and that were fully considered and rejected

⁷ Stephen T. Yelverton, Esq., Letter, Ref. No. 1800B3 (MB Jan. 5, 2005).

⁸ *Shaw Order*, 24 FCC Rcd at 5856.

⁹ *Id.* at 5853-54.

¹⁰ 47 C.F.R. § 73.313(e).

¹¹ *Id.*, §§ 74.1235(d), (d)(3).

¹² Petition at 1-2.

¹³ *Id.* at 1.

¹⁴ 47 C.F.R. § 1.106(b)(2).

by the Commission in the *Shaw Order*. The Commission stated, as to Lunderville's contention regarding alternative signal prediction methods under Section 73.313(e), that such methods are allowable only in limited circumstances, which were not present in the instant case. With regard to Lunderville's argument that Shaw's proposed translator violates the signal strength limits in Section 74.1235(d) of the Rules, the Commission explained that there is a conflict between those limits and the signal strength limits set forth in Section 74.1235(d)(3), which were more recently added to the Rules to conform to the amended FM Agreement between the United States and Canada.¹⁵ The Commission concluded that Section 74.1235(d)(3) is the controlling technical standard and that Shaw's proposed translator complied with these signal strength limits.¹⁶ Because Lunderville relies on facts and arguments that were fully considered and rejected by the Commission in this proceeding, we find that the public interest does not compel reconsideration, and that the Petition is subject to dismissal under Section 1.106(p)(3) of the Rules.¹⁷

6. Second, Lunderville purports to present new evidence, by way of affidavit, in support of his contention that the now-constructed W251BD translator station is receiving support from Mt. Washington, the WVMJ(FM) licensee, in violation of Section 74.1232(e) of the Rules.¹⁸ Again, however, Lunderville fails to meet the requirements for reconsideration. Lunderville, in his undated Affidavit, states that he has heard "daily" commercial advertisements for Shaw's other businesses over WVMJ(FM), but does not explain how this fact establishes that Mt. Washington is providing support to W251BD in violation of Section 74.1232(e).¹⁹ Even assuming, *arguendo*, that Lunderville's statements provided evidence of a rule violation, he does not indicate the time frame during which the advertisements were heard, only that these facts "could not have been known at the time that the translator first went on the air and when Lunderville first filed his petition to deny."²⁰ Again, however, the standard for reconsideration of Commission denial of an application for review is reliance on events occurring after the petitioner's *last* opportunity to present such facts to the Commission, not when it first initiated a pleading cycle. The Petition is thus subject to dismissal under Sections 1.106(p)(1) and (p)(2) of the Rules.²¹

7. Third, Lunderville devotes the majority of his Affidavit to allegations regarding Mt. Washington's efforts to promote WVMJ(FM) in Berlin, New Hampshire, and to sell advertising time to local businesses in Berlin, efforts which Lunderville contends have had a materially adverse effect on the advertising revenues of his station, WMOU(AM), licensed at Berlin.²² This also constitutes an attempt to

¹⁵ *Id.*, §§ 74.1235(d), (d)(3). See *Shaw Order*, 24 FCC Rcd at 5854.

¹⁶ *Id.*

¹⁷ 47 C.F.R. § 1.106(p)(3). See *Amendment of Certain of the Commission's Part I Rules of Practice and Procedure and Part O Rules of Commission Organizations*, Report and Order, 26 FCC Rcd 1594, 1606-08 (2011).

¹⁸ 47 C.F.R. § 74.1232(e). See Petition at 2-3 and attached Affidavit of Barry P. Lunderville. The Affidavit consists of one, unnumbered, continuous paragraph, thus spot citations thereto cannot be provided.

¹⁹ For example, it may be the case that Shaw is paying Mt. Washington for the commercial time.

²⁰ Petition at 2.

²¹ 47 C.F.R. §§ 1.106(p)(1), (p)(2).

²² Petition at 3.

re-argue points already presented to the Commission and rejected in the *Shaw Order*, which likewise subjects the Petition to dismissal.²³

8. Finally, Lunderville claims that W251BD is operating at higher power than authorized, citing as evidence only his Affidavit statement that “several experienced and accomplished Broadcast Engineers who have visited Berlin . . . have commented that in their opinion the Shaw Translator (W251BD) is broadcasting with an Effective Radiated Power far in excess of the permitted 10 watts. I cannot attest to this other than to say that I share their opinion, based on apparent signal strength and loudness.” While we may consider hearsay evidence if it contains indicia of reliability,²⁴ vague hearsay statements attributed to unidentified “Broadcast Engineers” do not possess such indicia. We thus find that, even were we to consider Lunderville’s allegations regarding the operation of W251BD, they do not state a material error, omission, or reason warranting reconsideration.²⁵

III. ORDERING CLAUSE

9. Accordingly, IT IS ORDERED, that the Petition for Reconsideration filed by Barry P. Lunderville IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

William T. Lake
Chief, Media Bureau

²³ See *Shaw Order*, 24 FCC Rcd at 5854-55 (Lunderville claimed allowing translators such as W251BD would “subvert full-service broadcast stations by redistributing advertising revenues away from them”; Commission concluded that its translator rules took such competition into account and nevertheless allowed the authorization of independent translators in any area desired).

²⁴ See *Echostar Communications Corp. v. FCC*, 292 F.3d 749, 753 (D.C. Cir. 2002).

²⁵ 47 C.F.R. § 1.106(p)(1).