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In re: DW276BX, Pompton Lakes, NJ
New Jersey Public Broadcasting Authority
Facility ID No. 143128
File No. BLFT-20071130ADA

Petition for Reconsideration

Dear Counsel:

We have before us a second Petition for Reconsideration ("Second Petition") filed on August 9, 2009, by Mariana Broadcasting, Inc. ("Mariana"), licensee of daytime-only AM Station WGHT(AM), Pompton Lakes, New Jersey. Mariana seeks reconsideration of the July 13, 2009, letter (the "*Staff Decision*") dismissing Mariana's request for reinstatement of the license for FM translator Station DW276BX, Pompton Lakes, New Jersey (the "Station").[1] For the reasons set forth below, we dismiss the Second Petition.

Background. On November 18, 2008, New Jersey Public Broadcasting Authority ("NJPBA"), former Station licensee, requested voluntary cancellation of the Station license. The staff granted NJPBA's request and announced cancellation of the license by Public Notice on January 16, 2009.[2] On February 17, 2009, Mariana filed a Petition for Reconsideration ("Initial Petition"), stating that cancellation of the license was "contrary to the public interest, and harmful to the welfare and safety of the residents of Pompton Lakes."[3]

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[1] *Mariana Broadcasting, Inc.*, Letter, 24 FCC Rcd 9064 (MB 2009).

[2] *Broadcast Actions*, Public Notice, Report No. 46904 at 1 (Jan. 16, 2009) ("*Public Notice*").

[3] Initial Petition at 1. Mariana also included as exhibits several letters of support from local police departments, members of the New Jersey General Assembly, and a letter from Congressman Bill Pascrell, Jr., representing the Eighth District of New Jersey.

The *Staff Decision* found that Mariana lacked standing to file the Initial Petition because it had failed to show that its interests had been adversely affected by the voluntary cancellation of the Station license. The *Staff Decision* indicated that "[w]hile we acknowledge Mariana's desire to expand coverage of its local programming to nighttime service, cancellation of the DW276BX Station license in no way affects Mariana's current programming or coverage. Moreover, Mariana has no rights with regard to assignment or disposal of this license and therefore no interest which could be adversely affected by its cancellation."[4] The *Staff Decision* also noted that it was unable to provide the relief requested because "the Commission has no authority to require any party [e.g., NJPBA] to assume a license and the corresponding duties and responsibilities that inhere in assuming the role of a licensee . . . ."[5] Finally, the *Staff Decision* noted that grant of Mariana's petition would violate the procedural rights of other potential applicants that might have an interest in operating the Station or a facility precluded by reinstatement of the Station license.[6]

In the Second Petition, Mariana reiterates its arguments that 167,000 people located within 5 miles of WGHT(AM)'s transmitter are served by no other signal that provides coverage of local news or events after sunset.[7] Additionally, Mariana argues that: (1) a party cannot elect to cease being a licensee to the detriment of the public or another licensee, citing *Pappamal Wellington Kurian*;[8] (2) it has standing to seek reconsideration as a "local listener, a local resident, a competitor, or the proposed originating station or assignee of W276BX," because "WGHT(AM)'s authority to utilize an FM translator, and to provide service at night, will be eliminated if W276BX is not reinstated";[9] and (3) the Commission should "exercise its public interest mandate and facilitate such a service whether it believes Mariana has standing . . . or not."[10] Mariana also states that the *Staff Decision*'s reliance on *Ashbacker Radio Corp. v. FCC* is misplaced,[11] and it references Section 310(d) of the Act which, it states, "prohibits the Commission from considering any applicant but the proposed assignee in processing an assignment application."[12] Finally, Mariana argues that reinstatement of the Station license is particularly warranted because only a currently licensed FM translator station may be used to retransmit the signal of an AM station.[13]

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[4] *Staff Decision,* 24 FCC Rcd at 9065.

[5] *Id.* at 9066, citing 47 U.S.C. § 303 (describing the powers and duties of the Commission).

[6] The *Staff Decision* cited *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327, 333 (1945) ("*Ashbacker*"), in which the Supreme Court held that, where two parties' applications are mutually exclusive, to grant one application without first considering the other would deny the second applicant the procedural right to a hearing granted to it by Congress.

[7] Second Petition at 3. Mariana again submits letters of support from local governmental officials and agencies. *See generally id.* at Exhibits 1-9.

[8] *Pappamal Wellington Kurian*, 22 FCC Rcd 18660 (WTB 2007) ("*Kurian*").

[9] Second Petition at 8.

[10] *Id.* at 6.

[11] *Id.* at 10, citing *Ashbacker*. Mariana references *EchoStar Satellite Operating Corp.*, 23 FCC Rcd 3252 (2008), at ¶ 12 which states that *Ashbacker* (which provides guidance in selecting a license grantee from a pool of mutually exclusive applicants) does not apply where no other petitions or applications exist, as in this case.

[12] *Id.* at 10.

[13] *Id.* at 11, citing *Amendment of Service and Eligibility Rules for FM Broadcast Translator Stations,* Report and Order, 24 FCC Rcd 9462 (2009).

Discussion. Section 1.106(k)(3) of our Rules states that a "petition for reconsideration of an order which has been previously denied on reconsideration may be dismissed by the staff as repetitious."[14] As the Commission has observed, "[i]f the 'tacking' of petitions were permitted, Commission actions might never become final and the rule would become nugatory."[15] Mariana has shown no "extraordinary circumstances" here – that it is required to continue the *status quo* as an AM daytime station is not in any way "extraordinary" – and we will dismiss the Second Petition as repetitious.

Moreover, the Second Petition is without merit. Reconsideration is warranted only if the Petitioner sets forth an error of fact or law, or presents new facts or changed circumstances which raise substantial and material questions of fact that otherwise warrant reconsideration of the prior action.[16] For the reasons set forth in the *Staff Decision,* Mariana has no interest in the Station license and its cancellation does not impact in any way Mariana's current operation of WGHT(AM). Thus, Mariana lacks standing to seek reconsideration of the cancellation of the Station license because it is not adversely affected by that action.[17]

In particular, Mariana's reliance on *Kurian* to establish standing is unavailing. In *Kurian*, Ms. Kurian, former wife of the licensee, Mr. Kurian, sought to block Mr. Kurian's request to cancel 39 wireless station authorizations. She contended that those licenses had been awarded to her pursuant to a court-approved property settlement.[18] However, the cancellations at issue in *Kurian* were based on rules not applicable to the broadcast services. Thus, *Kurian* is inapposite. Moreover, under the wireless radio authorization rules at issue in *Kurian*, licenses "automatically terminate, without specific Commission action" if the licensee fails to meet applicable construction or coverage requirements, or service is permanently discontinued.[19] Mr. Kurian's "request" to cancel these authorizations was, in fact, a notification that they had cancelled automatically under these rules. In rejecting Ms. Kurian's initial challenge to the requested cancellations, the Mobility Division of the Wireless Telecommunications Bureau ("WTB") noted specifically that "the identity of the party notifying the Commission of the cancellation, and even the absence of any such notification, is not relevant to the question of the whether the license had cancelled."[20] In contrast, NJPBA requested the *voluntary* dismissal of the Station License. Axiomatically, only a licensee can make such a request. WTB reinstated two authorizations on reconsideration based on facts that established that automatic cancellation had not occurred. That action, however, does not provide any support for Mariana's novel standing theory here.

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[14] 47 C.F.R. § 1.106(k)(3). *See also A.G.P., Inc.,* Memorandum Opinion and Order, 11 FCC Rcd 4628, 4629 (1996) and *Iolaa Broadcasting Company,* Memorandum Opinion and Order, 2 FCC 2d 439 (1966) (it is not in the interests of orderly procedure to permit repeated petitions for reconsideration).

[15] *Great Lakes Broadcast Academy, Inc.*, Memorandum Opinion and Order, 19 FCC Rcd 11655, 11656 (2004), citing *Brainerd Broadcasting Co.*, 25 R.R. 297, 298 (1963).

[16] *See* 47 C.F.R. § 1.106.

[17] *See* 47 U.S.C. § 405(a)(requiring petitioners to show they will be adversely affected by the decision at hand).

[18] *Kurian,* 22 FCC Rcd at 18662.

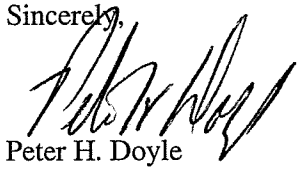
[19] See 47 C.F.R. §§ 1.955(a)(2) and (3).

[20] *Kurian*, 22 FCC Rcd at 18661 (quoting *Letter to George L. Lyon, Jr.* (WTB Feb.12, 2007)).

Finally, we conclude that Mariana's argument that *Ashbacker* is inapposite is also without merit.[21] The issuance of an authorization to Mariana, as proposed in the Second Petition, would necessarily prejudice the rights of potential competing applicants.[22] Thus, assuming *arguendo*, that the staff has the authority to reinstate the Station license without specifying NJPBA as the licensee, we would still be required to afford other interested parties the opportunity to compete for this spectrum. Mariana's reliance on Section 310(d) is misplaced. Even if there were a license to assign, no application is pending before the Commission.

Conclusion/Action. Accordingly, IT IS ORDERED, that the Petition for Reconsideration filed on August 9, 2009, by Mariana Broadcasting, Inc. is DISMISSED.

Sincerely,



Peter H. Doyle
Chief, Audio Division
Media Bureau

[21] Second Petition at 10.

[22] *See Modification of FM and TV Authorizations to Specify a New Community of License*, 4 FCC Rcd 4870, 4873 (1989), citing *Cheyenne, Wyoming,* 62 FCC 2d 63 (1976); *see also Bachow Communications Inc. v. FCC,* 237 F.3d 683, 689 (D.C. Cir 2001) (due process rights established in *Ashbacker* also protect potential applicants that could not file competing proposals due to an application freeze), citing *Kessler v. FCC,* 326 F.2d 673 (D.C. Cir. 1963).