**Before the**

Federal Communications Commission

Washington, D.C. 20554

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| In the Matter of  Park Public Radio, Inc.  Minor Change to Low Power FM Station KPPS-LP, St. Louis Park, Minnesota  Central Baptist Theological Seminary of Minneapolis  Minor Change to FM Translator Station K250BY, Plymouth, Minnesota | **)**  **)**  **)**  **)**  **)**  **)**  **)**  **)**  **)**  **)**  **)**  **)**  **)**  **)**  **)** | Application File No. 142335  Facility ID No. 196131  Application File No. 142489  Facility ID No. 202408 |

Memorandum Opinion and order

**Adopted: August 5, 2024 Released: August 6, 2024**

By the Commission:

# Introduction

1. We have before us an Application for Review (AFR) filed by Park Public Radio, Inc. (Park)[[1]](#footnote-3) and an Opposition thereto filed by Central Baptist Theological Seminary of Minneapolis (Central Baptist).[[2]](#footnote-4) In the AFR, Park seeks Commission review of a letter decision on reconsideration (*Reconsideration Letter*) issued by the Audio Division, Media Bureau (Bureau), on February 6, 2023. [[3]](#footnote-5) The *Reconsideration Letter* upheld a staff letter decision that: (1) dismissed the above-captioned application to modify the facilities of low power FM (LPFM) station KPPS-LP, St. Louis Park, Minnesota (KPPS-LP) filed by Park on March 31, 2021 (Park Modification Application); and (2) granted the above-captioned mutually-exclusive application to modify the facilities of FM translator station K250BY, Plymouth, Minnesota (K250BY), filed by Central Baptist Theological Seminary of Minneapolis (Central Baptist) on April 1, 2021 (Central Baptist Modification Application).[[4]](#footnote-6) For the reasons stated below, we grant the Application for Review, rescind the grant of the Central Baptist Modification Application, and leave the Park Modification Application in dismissed status but permit 30 days to allow Park to file a request for reinstatement *nunc pro tunc*.

# BACKGROUND

1. On March 31, 2021, Park filed the Park Modification Application, seeking approval for a new channel and transmitter site for KPPS-LP.[[5]](#footnote-7) In the Engineering Statement attached to the Park Modification Application, Park argued that it was not required to protect LPFM station KQEP-LP, St. Paul, Minnesota (KQEP-LP) because the KQEP-LP license “expires as of 3:00 am April 1, 2021 . . . No license renewal has been filed. No signal from KQEP-LP has been heard in well over a year, and no transmitting antenna could be found at or near the coordinates specified in its license.”[[6]](#footnote-8) The Park Modification Application also proposed to: (1) retain an existing two-kilometer short-spacing to FM translator station K250BY, Minneapolis, Minnesota (K250BY) while moving KPPS-LP from a second-adjacent to a first-adjacent channel;[[7]](#footnote-9) and (2) decrease existing short-spacing to FM translator station W248CU, Minneapolis, Minnesota (W248CU) while moving KPPS-LP from a first-adjacent to a second-adjacent channel.[[8]](#footnote-10) These short-spacings were originally created as a result of modifications to K250BY and W248CU.[[9]](#footnote-11) Under section 73.807(d), such involuntarily short-spaced LPFM stations may relocate provided that the existing distance separation is not reduced by the move.[[10]](#footnote-12) Park argued that, under section 73.807(d), it should be allowed to relocate and retain its existing “grandfathered” distance separations despite the channel change because it would still be short-spaced by two kilometers before and after the modification; however, it also requested a new waiver “if needed.”[[11]](#footnote-13) In a pleading filed in support of its proposal, Park noted that another LPFM applicant, Wimberley Valley Radio (Wimberley), had been previously authorized to retain its short-spacing while changing from a first-adjacent to a second-adjacent channel.[[12]](#footnote-14)
2. By its terms, the KQEP-LP license expired at 3:00 a.m. on April 1, 2021. At 9:46 am that same day, April 1, 2021, Central Baptist filed an application to modify the facilities of FM translator station K250BY (Central Baptist Modification Application).[[13]](#footnote-15) On April 2, 2021, the Bureau cancelled the KQEP-LP license and deleted its call sign for failure to file a renewal application. Public notice of the cancellation was published on April 7, 2021.[[14]](#footnote-16) On April 12, 2021, Central Baptist filed a petition to deny the Park Modification Application.[[15]](#footnote-17)
3. *Staff Letter.* On July 5, 2022, the Bureau issued the *Staff Letter*, dismissing the Park Modification Application and granting the Central Baptist Modification Application.[[16]](#footnote-18) Based on information that Park filed its Application approximately six hours before KQEP-LP’s license expired,[[17]](#footnote-19) the *Staff Letter*  determined that the Park Modification Application was “prematurely filed.” [[18]](#footnote-20) Park’s failure to protect the KQEP-LP license at the time of filing, the Bureau concluded, was an acceptability defect that should have resulted in the rejection of the Park Modification Application when it was filed.[[19]](#footnote-21) It explained that allowing such “prematurely filed applications . . . would be unfair to all other similarly-situated prospective applicants for the available spectrum.”[[20]](#footnote-22) The Bureau further stated that the Central Baptist Modification Application “did not suffer from the same flaw, as it was filed after the KQEP-LP license had expired.”[[21]](#footnote-23) The *Staff Letter* did not analyze whether the KQEP-LP license had expired under section 312(g) of the Communications Act of 1934, as amended (Section 312(g)),[[22]](#footnote-24) prior to the filing of the Park Modification Application.
4. On alternative and independent grounds, the Bureau dismissed the Park Modification Application for presenting a “new and impermissible first-adjacent short-spacing to K250BY.”[[23]](#footnote-25) The Bureau held that the move was not authorized under section 73.807(d) of the Rules because “there is no grandfathering provision for maintaining an ‘existing’ short-spacing when changing channels.”[[24]](#footnote-26) The Bureau also rejected Park’s waiver request.[[25]](#footnote-27) Finally, the Bureau rejected Park’s comparison with the Wimberley Modification Application because: (1) the Wimberley decision was unpublished and thus lacked precedential value; and (2) the facts of the two cases are distinguishable—whereas Wimberley proposed to move to a further frequency (from a first-adjacent to second-adjacent channel), Park proposed to move to a closer frequency (from a second-adjacent to a first-adjacent channel).[[26]](#footnote-28) Therefore, in terms of interference, Wimberley “improved matters” whereas the Park proposal was “problematic.”[[27]](#footnote-29)
5. *Petition for Reconsideration.* On August 4, 2022, Park filed a petition for reconsideration of the *Staff Letter*, arguing that: (1) the Park and Central Baptist Modification Applications were similarly situated under *Melody Music* in that they were both premature and thus should have been treated similarly with respect to protecting KQEP-LP;[[28]](#footnote-30) (2) the Bureauerred by not considering whether the KQEP-LP license had automatically expired under Section 312(g) when Park raised this issue in the Park Modification Application by stating that KQEP-LP “no longer exists” because it “[has] not been heard for well over a year;”[[29]](#footnote-31) (3) the Bureau should have “analyzed the similarities and differences” between the Park and Wimberley Modification Applications as “materially analogous situations”;[[30]](#footnote-32) and (4) the Bureau incorrectly cited a rule provision applicable only to the Wireless Service.[[31]](#footnote-33) Park further argues that “citing to non-existent rules and/or ignoring the express terms of applicable rules, as well as due process inherent in *Melody Music*, the Letter Ruling violated the [Administrative Procedure Act (APA)]’s ban or adjudication that is arbitrary and capricious, an abuse of discretion, or not in accord with rules or statutes.”[[32]](#footnote-34)
6. *Reconsideration Letter.* On February 6, 2023, the Bureau issued the *Reconsideration Letter*, dismissing in part and otherwise denying Park’s Petition.[[33]](#footnote-35) With regard to protecting KQEP-LP, the Bureau found that the Park and Central Baptist modification applications were not similarly situated because the former was filed before the KQEP-LP license expired at 3 a.m. on April 1, 2021, while the latter was filed afterward.[[34]](#footnote-36) In determining the relevant date upon which any conflicting application would have been acceptable for filing, the Bureau applied the policy—set out in the 2014 *Harrisonburg* decision—of accepting conflicting applications for one day after a construction permit has expired.[[35]](#footnote-37) Because the Central Baptist Modification Application was filed before a conflicting application would be acceptable under *Harrisonburg* (April 2, 2021), but after the KQEP-LP license expired by its own terms at 3 a.m. on April 1, 2021, the Bureau found that it was not filed prematurely.[[36]](#footnote-38) Conversely, the Bureau concluded, the Park Modification Application was filed prior to the KQEP-LP expiration and therefore “should not have been accepted at the time of filing.”[[37]](#footnote-39) The Bureau dismissed Park’s Section 312(g) argument for failure to raise the matter earlier “with sufficient clarity.”[[38]](#footnote-40) Even “assuming for the sake of argument” that the Section 312(g) claim had been timely raised, the Bureau found that the additional evidence submitted in Park’s petition for reconsideration did not establish that KQEP-LP had been silent for the requisite consecutive 12-month period prior to April 1, 2021, and that the information submitted by Park did not warrant further investigation into the matter.[[39]](#footnote-41)
7. Regarding Park’s request to remain short-spaced to K250BY and W248CU while changing channels, the Bureau found that it was not required to consider the unpublished Wimberley Modification Application as binding precedent, and, moreover, the two applications were not similarly situated under *Melody Music* because they proposed different channel relationships.[[40]](#footnote-42) The Bureau affirmed its denial of the Park waiver request.[[41]](#footnote-43) Finally, the Bureau explained that its dismissal of the Park Modification Application was not arbitrary or capricious under the APA because the *Staff Letter* thoroughly explained its reasoning and the public policy reasons behind its decision.[[42]](#footnote-44)
8. *Application for Review.* In the Application for Review, Park makes numerous arguments to challenge the Bureau’s dismissal of its Modification Application.[[43]](#footnote-45) Park challenges the Bureau’s “premature filing” rationale as a basis for dismissal, arguing that there is no rule that requires dismissal of Park’s Application as premature under the circumstances presented.[[44]](#footnote-46) Park argues that the Bureau erroneously cited section 1.934(f) of the Rules, which applies only to Wireless Radio Services,[[45]](#footnote-47) and did not provide any other rule, order, or precedent for dismissal in these circumstances “because such precedent does not exist.”[[46]](#footnote-48) Rather, according to Park, the Commission’s rules provide that a minor modification application may be filed at any time,[[47]](#footnote-49) and the Commission has said that it “will not take adverse action on [an application] based solely on its acceptability as filed, when subsequent events prior to staff review resulted in a fully acceptable application.”[[48]](#footnote-50) In these circumstances, Park concludes, the Bureau’s dismissal of its application was arbitrary and capricious because it was based on a policy that is not explicitly stated.[[49]](#footnote-51) Park also asserts that dismissal was improper because “applications that do not meet all acceptance requirements are normally issued a deficiency letter, and an opportunity to amend its application prior to dismissal.”[[50]](#footnote-52) Park further argues that *Harrisonburg* is inapplicable here because that decision related to the expiration of an unbuilt modification construction permit in the NCE service, while this proceeding implicates a license renewal for an existing full service station.[[51]](#footnote-53)
9. Park submits that although the Bureau concluded that the Park and Central Baptist Modification Applications were both filed prematurely, the Bureau failed to treat them similarly by dismissing Park’s and granting Central Baptist’s.[[52]](#footnote-54) Park points out that both Modification Applications were filed before the deadline for acceptance of a KQEP renewal application (i.e., April 2, 2021)[[53]](#footnote-55) Park contends that, from a public interest standpoint, both applications caused the harm that the Bureau ascribed to the Park Application alone—*i.e.*, precluding subsequent modification applications for the same spectrum and conflicting with any renewal application filed by the KQEP-LP licensee, requiring the comparison of the applications as mutually exclusive, or the dismissal of both.[[54]](#footnote-56)
10. Park argues that even if it did not specifically use the term “312(g)” in the Park Modification Application and related pleadings, it “should have been clear” that it was invoking Section 312(g) when it stated that KQEP-LP was not on the air and had not been for more than a year.[[55]](#footnote-57) Park also asserts that it subsequently submitted sufficient documentation to at least raise the issue that KQEP’s license had expired as a matter of law and that the Bureau erred in dismissing such documentation as improperly raised on reconsideration.[[56]](#footnote-58) Park argues that the Bureau should have taken steps to investigate the operating status of KQEP-LP before dismissing the Park Modification Application.[[57]](#footnote-59)
11. Regarding the short-spacing to the two translator stations, Park contends that: (1) section 73.807(d) is explicit with respect to allowable transmitter relocations but does not set out any guidance regarding channel changes for involuntarily short-spaced LPFM stations; (2) that policy considerations and fairness would indicate some flexibility be provided for such applicants; and (3) that the Bureau failed to treat Park similarly to the *Wimberley* applicant, who was permitted to maintain a grandfathered short-spacing while changing to a more “distant” channel.[[58]](#footnote-60) Park asserts that when an involuntarily short-spaced LPFM licensee seeks to change channels, the Commission “should carefully compare the proposal to determine if interference is improved over the licensed facility”[[59]](#footnote-61) and that “it is only fair that LPFM stations that face pre-existing short-spacing due to the later licensing of an FM translator station be allowed some flexibility in how they can protect those FM translator stations from interference.”[[60]](#footnote-62) Even if the Wimberley grant cannot be used as precedent, Park urges, it should be given the flexibility to “carry-over short-spacing of a particular station to an adjacent channel, particularly when there is no contour overlap on the new channel.”[[61]](#footnote-63)
12. Park states that, after receiving the *Staff Letter*, it obtained site assurance to relocate to a site that would eliminate the objectionable short-spacing to K250BY completely.[[62]](#footnote-64) However, when, within 30 days of the dismissal, it tried to file a request for reinstatement *nunc pro tunc* (that is, reinstatement in the processing line with the filing date of the original submission) accompanied by a curative amendment, “LMS would not accept an amendment to a dismissed application,” and Bureau staff advised that Park was not permitted to file a *nunc pro tunc* curative amendment because it had previously requested a waiver.[[63]](#footnote-65) Park believes that “it is still due the opportunity to file a minor curative amendment . . . [to] eliminate the 2 km short-spacing of the licensed K250BY from a new site, should the K250BY permit be rescinded.”[[64]](#footnote-66)
13. In the Opposition, Central Baptist reiterates the Bureau’s conclusions, contending that all salient issues were correctly decided in the *Reconsideration Letter* and should be affirmed on review.[[65]](#footnote-67) In particular, Central Baptist points out that the Bureau not only found that it did not have to consider the Wimberley Modification Application as binding precedent but also performed a *Melody Music* analysis and explained the key difference between the two applications with respect to the likelihood of interference.[[66]](#footnote-68) Central Baptist also urges that allowing a *nunc pro tunc* amendment to correct the spacing defect would be “highly inappropriate” because it would compromise the finality of the “full decision on the merits.”[[67]](#footnote-69) In sum, Central Baptist argues that the Bureau fully considered the facts before it, applied appropriate precedent, and correctly dismissed the Park Modification Application as procedurally and substantively deficient.[[68]](#footnote-70)
14. In its Reply, Park reiterates previous arguments, namely, that: (1) the Bureau misapplied existing rules and precedent when it dismissed the Park Modification Application (specifically contending that *Harrisonburg* is not applicable here but that *Wimberley* is); (2) involuntarily short-spaced LPFM stations should be afforded flexibility to change channels; and (3) there is Bureau-level precedent[[69]](#footnote-71) for allowing a *nunc pro tunc* amendment after a waiver request.[[70]](#footnote-72) Park also debates some factual points relating to its Section 312(g) claim, which we do not address further given that we uphold the staff’s procedural and administrative reasons for not instigating a factual investigation into Park’s Section 312(g) claim.

# DISCUSSION

1. We grant the Application for Review, rescind the grant of the Central Baptist Modification Application, and leave the Park Modification Application in dismissed status but permit 30 days to allow Park to file a curative amendment and request for reinstatement *nunc pro tunc*. An application for review of a final action taken on delegated authority will be granted when, *inter alia*, such action: conflicts with statute, regulation, precedent or established Commission policy; involves application of a precedent or policy that should be overturned; or makes an erroneous finding as to an important or material factual question.[[71]](#footnote-73) In this case, we find that the dismissal of the Park Modification Application conflicted with established Commission policy regarding the processing of defective minor modification applications.
2. *Protection of KQEP-LP.*  Section 73.870(e) references the first-come, first-served processing procedures, which our implementing order made clear applies to the low power radio service.[[72]](#footnote-74) Accordingly, consistent with the text of our rule and implementing order, we apply the Commission’s longstanding first-come, first-served processing procedures to minor modifications in the LPFM service.[[73]](#footnote-75) Under these procedures, the filing of the first modification application “cuts off” the filing rights of subsequent conflicting applications. At issue here is whether an LPFM modification application that contains a short-spacing defect when originally filed obtains cut-off priority over a later-filed FM translator application. For the reasons set out below, we hold that it does. As a threshold matter, we find that both the Park and Central Baptist Modification Applications were initially defective because neither protected KQEP-LP at the time of filing. When a conflicting application relies on the expiration of an existing station license, it must protect that station’s licensed facilities until the Bureau has issued a letter, public notice, or both, affirmatively stating that the license has been cancelled and such order has become final.[[74]](#footnote-76) Here, the Bureau issued a public notice on April 7, 2021, announcing that the KQEP-LP license had been cancelled and its call sign deleted (*Cancellation Notice*).[[75]](#footnote-77) The licensee did not seek reconsideration of or otherwise challenge the *Cancellation Notice* within 30 days after publication. Therefore, the *Cancellation Notice* became final after May 17, 2021, 40 days after publication.[[76]](#footnote-78)For the reasons set out in the *Reconsideration Letter*, we reject Park’s contention that the KQEP-LP license had already expired under Section 312(g), namely: (1) Park did not raise the Section 312(g) issue “with sufficient clarity” prior to the *Staff Letter*; (2) the Section 312(g) issue was untimely raised on reconsideration; and (3) the issuance of an LOI would not have been an efficient use of administrative resources, given the imminent license expiration.[[77]](#footnote-79)
3. Moreover, we find that the *Harrisonburg* policy is not applicable here. The one-day filing “window” for allowing mutually exclusive applications applies only to the expiration of construction permits, not licenses.[[78]](#footnote-80) These two situations are not analogous because license expirations do not implicate the policy concern in *Harrisonburg* that a permittee might attempt to warehouse unused spectrum by immediately filing a replacement construction permit application prior to permit expiration, thus precluding potentially competing applications while not using the spectrum itself. Licensed spectrum, on the other hand, is generally being put to active use serving the public and is thus statutorily protected from competing applications.[[79]](#footnote-81) In sum, we conclude that the KQEP-LP license was entitled to protection through and including May 17, 2021, after which the *Cancellation Notice* became final because the licensee did not seek reconsideration or otherwise challenge the cancellation. Both the Park and Central Baptist Modification Applications, filed on March 31 and April 1, 2021, respectively, were short-spaced to KQEP-LP at the time of filing and therefore technically deficient.
4. For FM services at issue here, a deficient application is subject to dismissal.[[80]](#footnote-82) A dismissed application may be reinstated *nunc pro tunc*—that is, as of its original filing date—if the applicant files a minor curative amendment within 30 days of the dismissal.[[81]](#footnote-83)Reinstatement *nunc pro tunc* subjects conflicting applications to the original filing (cut-off) date of the reinstated application.[[82]](#footnote-84) In both the NCE and commercial services, the Commission will not dismiss an application for a defect present at the time of filing if the defect is eliminated prior to staff action on the application—whether through an amendment to the application, a change in applicable law, or a change in circumstances.[[83]](#footnote-85) Not all initial defects are curable—the Commission has identified certain “fatal” defects that may not be subsequently cured, such as failure of an NCE applicant to obtain reasonable assurance of site availability.[[84]](#footnote-86) Here, by the time the staff processed the Park Modification Application on July 5, 2022, the cancellation of the KQEP-LP license was long final, so the short-spacing with respect to KQEP-LP was eliminated prior to staff action on the Applications. Therefore, the Park Modification Application was dismissed in error on this basis. Moreover, even if erroneously dismissed, Park was entitled to consideration *nunc pro tunc*, which was prevented by the newly-implemented LMS licensing database which at the time did not accept petitions for reconsideration or accompanying amendments to dismissed applications.
5. The Commission’s policy on defective applications represents a carefully considered balance between avoiding the harshness of strict review[[85]](#footnote-87) while retaining a sufficiently rigorous review process to encourage complete applications and weed out speculative filings.[[86]](#footnote-88) When the Commission modified its processing procedures in 1992 to eliminate the previous “hard look” processing standard and allow applicants limited opportunities to amend defective applications, it acknowledged that a consequence of the new procedure would be that“a previously filed defective modification application could, by corrective amendment, prevail over a later filed non-defective applications.”[[87]](#footnote-89) In general, the current approach to processing modification applications, as refined in *Semora*, has worked smoothly and well for many decades.[[88]](#footnote-90)
6. *Protection of K250BY.* For the reasons stated in the *Reconsideration Decision*, we affirm the Bureau’s determination that, absent grant of a waiver, an LPFM licensee may not change its channel to a first-adjacent channel while retaining its grandfathered short-spacing, even if it otherwise satisfies the requirements of section 73.807(d).[[89]](#footnote-91) We agree that this closer spectrum relationship is more likely to create listener interference, a fundamental licensing concern in the LPFM and other services.[[90]](#footnote-92) For the same reason, we conclude that waiver of the first-adjacent spacing requirements would be inappropriate based on the circumstances presented in this case.[[91]](#footnote-93) Deviation from the rule here is not in the public interest because a closer channel relationship is more likely to create listener interference even if the short-spaced distance does not change. Moreover, Park has not shown special circumstances that would justify waiver of the LPFM spacing requirements. In fact, Park argues that LPFM stations generally could benefit from allowing such channel changes.[[92]](#footnote-94) Therefore, we reject the argument that section 73.807(d) permits an LPFM station to retain grandfathered short-spacing when switching to a closer channel absent grant of a waiver. And, for the reasons set forth above, we deny the request for a waiver of the minimum distance separation requirements.
7. With respect to the Bureau’s grant of the Wimberley application, this staff action is not binding on the Commission.[[93]](#footnote-95) In addition, as a mere grant of an application without an accompanying explanation of the basis for the decision, the mere grant of the Wimberley application has no precedential value.[[94]](#footnote-96) On alternative and independent grounds, we agree with the Bureau that Park was not similarly situated to Wimberley with respect to section 73.807(d) because “[Wimberley] moved from a co-channel relationship . . . to a first-adjacent channel relationship (a better channel relationship, in terms of interference) . . . [Park], on the other hand, proposes to move KPPS-LP from a second-adjacent channel short-spacing (on channel 248, 97.5 MHZ, a better channel relationship in terms of potential interference between two nearby stations) to a first-adjacent channel short-spacing (on channel 249, 97.7, a worse channel relationship in terms of interference.).”[[95]](#footnote-97) The Bureau clearly explained the factual distinction between the two applications and articulated the underlying policy concern of increased likelihood of interference.[[96]](#footnote-98) We reject, on the basis that it would substantially undermine the minimum distance separation rule for LPFM stations, Park’s argument that a contour overlap showing is sufficient to demonstrate that interference is unlikely. When it created the LPFM service, the Commission considered and determined that the minimum distance separation methodology is the best means to prevent interference in the LPFM service.[[97]](#footnote-99) Allowing contour overlap showings as an alternative, in the absence of a waiver, would create a considerable and systematic exception to the LPFM spacing rules. For these reasons, we uphold the Bureau’s conclusions that the rules do not provide for an LPFM station to move to a new, closer channel while preserving its grandfathered short-spacing status absent grant of a waiver and that Park has not justified a waiver here.
8. However, as noted above, Park was entitled to consideration under our *nunc pro tunc* policy, which allows curative amendments within 30 days of the dismissal of a defective application.[[98]](#footnote-100) We reject Central Baptist’s argument that a *nunc pro tunc* amendment would compromise the finality of the staff’s decision because the decision granting Central Baptist’s application never became final due to the filing of the Petition for Reconsideration and Application for Review.[[99]](#footnote-101) Because Park attempted to amend to cure the K250BY short-spacing but was prevented from doing so by technical issues with the Commission’s filing system, we direct the Bureau to allow Park to file a single amendment to the Park Modification Application within 30 days of the issuance of this order. If, upon staff review, the Park Modification Application is rule-compliant and reinstated *nunc pro tunc*, it will be processed as though it were filed without defect on its original filing date of March 31, 2021. Grant of the Central Baptist Modification Application will be rescinded and returned to “pending” status, so that the two applications are restored to the “first-come, first-served” processing queue.[[100]](#footnote-102)
9. We note that applicants choosing to file in anticipation of a future action do so at their own risk. If the future action does not come to pass (due to, for example, a late-filed application to re- instate a license), or if staff reviews the prematurely filed application prior to the future action, then the applicant will be dismissed and, if not able to cure the defect *nunc pro tunc*, will lose their first-in-time filing priority and have to file a new application. For these reasons, we encourage applicants to carefully evaluate such risks prior to submitting applications that are defective at the time of filing.
10. *Conclusion.* For the foregoing reasons, we find that the Bureau, in the *Reconsideration Letter*,did not correctly apply established Commission policy regarding the filing of defective minor modification applications. Therefore, we grant the Application for Review, rescind the grant of the Central Baptist Modification Application, and leave the Park Modification Application in dismissed status but permit 30 days to allow Park to file a petition for reconsideration accompanied by an appropriate curative amendment.[[101]](#footnote-103)

# ORDERING CLAUSES

1. IT IS ORDERED that, pursuant to Section 5(c)(5) of the Communications Act of 1934, as amended,[[102]](#footnote-104) and Section 1.115(g) of the Commission’s Rules,[[103]](#footnote-105) the Application for Review filed by Park Public Radio, Inc. on March 10, 2023 (Pleading File No. 212376) IS GRANTED.
2. IT IS FURTHER ORDERED that, pursuant to Section 5(c)(6) of the Communications Act of 1934, as amended, and Section 1.115(h)(1)(iii) of the Commission’s Rules, the application for a minor change to LPFM station KPPS-LP, St. Louis Park, Minnesota, filed by Park Public Radio, Inc. on March 31, 2021 (Application File No. 142335), may be amended in accordance with the Commission’s *nunc pro tunc* policy until September 5, 2024, at which time it will be assessed for compliance with the Commission’s rules and disposed of accordingly.
3. IT IS FURTHER ORDERED that, pursuant to Section 5(c)(6) of the Communications Act of 1934, as amended,[[104]](#footnote-106) and Section 1.115(h)(1)(i) of the Commission’s Rules,[[105]](#footnote-107) the grant of the application for a minor change to FM translator station K250BY, Plymouth, Minnesota, filed by Central Baptist Theological Seminary of Minneapolis on April 1, 2021, (Application File No. 142489) IS RESCINDED and the application RETURNED TO PENDING STATUS.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch

Secretary

1. Pleading File No. 212376 (Mar. 10, 2023). [↑](#footnote-ref-3)
2. *See* Central Baptist’s Opposition to Park’s Application for Review (Mar. 17, 2023) (Pleading File No. 212664) (Opposition). [↑](#footnote-ref-4)
3. *Park Public Radio, Inc.*, Letter Decision, Ref. No. 1800B3-DB, Application File Nos. 142489 and 142335 (MB Feb. 6, 2023) (*Reconsideration Letter*). Public Notice of the dismissal of the Park petition for reconsideration was issued on February 8, 2023. *See Pleadings*, Public Notice, Report No. PN-3-230208-01 (MB Feb. 8, 2023). Therefore, the AFR was timely pursuant to 47 CFR 1.115(d) (“the application for review and any supplemental thereto shall be filed within 30 days of public notice of such action”). [↑](#footnote-ref-5)
4. *Id.* at 1 (upholding *Park Public Radio*, Letter Decision, Ref. No. 1800B3-DB, Application File Nos. 142489 and 142335 (MB July 5, 2022) (*Staff Letter*)). [↑](#footnote-ref-6)
5. Park Modification Application, Application File No. 142335 (filed March 31, 2021). [↑](#footnote-ref-7)
6. Park Modification Application, “Engineering Exhibit” attachment (Engineering Statement) at 1. [↑](#footnote-ref-8)
7. Engineering Statement at 2. Such short-spacings often occur when translators modify their facilities because while translators must avoid prohibited contour overlap with neighboring LPFM stations, they are not required to adhere to the minimum distance separation requirements applicable to LPFM stations. *See generally,* 47 CFR § 74.1204(a) (detailing the contour overlap protection requirements for translator stations). [↑](#footnote-ref-9)
8. Specifically, the W248CU short-spacing would change from 9 km on a first-adjacent channel to 7 km on a second-adjacent channel. Engineering Statement at 2. [↑](#footnote-ref-10)
9. Engineering Statement at 2-3. [↑](#footnote-ref-11)
10. 47 CFR § 73.807(d). [↑](#footnote-ref-12)
11. Engineering Statement at 1-2 (citing47 CFR § 73.807). [↑](#footnote-ref-13)
12. Opposition to petition to deny filed by Park on May 3, 2021 at 5-6 (Pleading File No. 144466) (citing Wimberley Valley Radio (Wimberley), Application File No. 94151 (granted Dec. 30, 2019) (Wimberley Modification Application), *Broadcast Actions*, Public Notice, Report No. PN-2-200102-01 (MB Jan. 2, 2020)). [↑](#footnote-ref-14)
13. Central Baptist Modification Application, Application File No. 142489 (Apr. 1, 2021). The Commission has stated, “[t]he term ‘conflicting’ refers to applications that cannot both be granted without creating impermissible interference. Conflicting applications are ‘mutually exclusive’ or ’competing’ if they meet applicable criteria entitling them to equal priority: mutually exclusive applications cannot be disposed of except by elimination of the mutual exclusivity through technical amendment, settlement between the applicants, auction or other means.” *1998 Biennial Regulatory Review*, First Report and Order, 14 FCC Rcd 5272, 5273, n.2 (1999). [↑](#footnote-ref-15)
14. *Broadcast Actions*, Public Notice, Report No. 49962 (April 7, 2021). [↑](#footnote-ref-16)
15. Pleading File No. 142335 (Petition to Deny). On May 3, 2021, Park filed an opposition to the Petition to Deny (Opposition) (Pleading File No. 144466). On May 7, 2021, Central Baptist filed a reply to the Opposition (Reply) (Pleading File No. 144799). Additional supplemental pleadings and motions are not relevant to the present discussion and thus not included here. [↑](#footnote-ref-17)
16. *Staff Letter* at 2. [↑](#footnote-ref-18)
17. *See id.* at 5 (“CBT argues that the PPR Application must be denied or dismissed because, on the date it was filed (9:04 pm on March 31, 2021), it was mutually exclusive with then existing station (KQEP-LP), the license of which expired at 3:00 am on April 1, 2021”). [↑](#footnote-ref-19)
18. *Id.* at 9, n.69 (citing 47 CFR § 1.934(f), which provides that applications in the Wireless Radio Services may be dismissed without prejudice if they are premature or late filed). [↑](#footnote-ref-20)
19. *Id.*. [↑](#footnote-ref-21)
20. *Id*. [↑](#footnote-ref-22)
21. *Id.* [↑](#footnote-ref-23)
22. 47 U.S.C. § 312(g). [↑](#footnote-ref-24)
23. *Staff Letter* at 10. [↑](#footnote-ref-25)
24. *Id.* at 10-11 (emphasis added);47 CFR § 73.807(d). [↑](#footnote-ref-26)
25. *Staff Letter* at 10-11. [↑](#footnote-ref-27)
26. *Staff Letter* at 10. [↑](#footnote-ref-28)
27. *Id.* [↑](#footnote-ref-29)
28. Pleading File No. 196977 at 2 (Aug.4, 2022) (citing *Melody Music v. FCC*, 345 F.2d 730 (D.C. Cir. 1965) (*Melody Music*) Park also argued that the Bureau erred in citing section 1.934(f) of the Rules (a wireless radio service rule) for the proposition that the Commission may dismiss premature applications without prejudice. *Id*. (referring to 47 CFR § 1.934(f)). [↑](#footnote-ref-30)
29. *Id.* at 7-8 (citing Engineering Statement at 1). [↑](#footnote-ref-31)
30. *Id.*at 2 (citing *Melody Music*,345 F.2d at 732-33 (holding that the Commission may not treat similarly-situated licensees differently without an adequate explanation for doing so)). [↑](#footnote-ref-32)
31. *Id*. at 3 (citing 47 CFR § 1.934(f)). [↑](#footnote-ref-33)
32. *Id*. at 7. The APA is codified at 5 U.S.C. §§ 551-559. [↑](#footnote-ref-34)
33. *Reconsideration Letter* at 14. [↑](#footnote-ref-35)
34. *Id.* at 11. [↑](#footnote-ref-36)
35. *Id.* (citing *Board of Trustees of Eastern Mennonite University*, Letter Decision, 29 FCC Rcd 5925, 5928 (MB 2014) (*Harrisonburg*)). [↑](#footnote-ref-37)
36. *Id.*, n.82. [↑](#footnote-ref-38)
37. *Id.* at 11. [↑](#footnote-ref-39)
38. *Id.* at 8. [↑](#footnote-ref-40)
39. *Id.* at 10. This information included a statement by Park’s principal that he had not been able to pick up KQEP-LP’s signal, an email from a building manager at the licensed coordinates that no radio antennas had been installed on the building, and photographs of the relevant buildings. *Id*. The Bureau found that Park’s statement was “unsupported by the record” and “did not warrant additional consideration or further investigation, especially when the parties (and Bureau) understood that the KQEP-LP license expired on April 1, 2021 . . .. An investigation under these circumstances would have been a waste of administrative resources.”). *Id*. at 9, n.69. [↑](#footnote-ref-41)
40. *Reconsideration Letter* at 12-13. [↑](#footnote-ref-42)
41. *Id.*at 13, n.97. [↑](#footnote-ref-43)
42. *Id*. at 13-14. [↑](#footnote-ref-44)
43. Park also suggests that Central Baptist could resolve this matter by voluntarily relocating to another channel. *Application for Review* at 13-14. [↑](#footnote-ref-45)
44. Application for Review at 5-6. [↑](#footnote-ref-46)
45. *See* 47 CFR § 1.934(f) (providing that the Commission may dismiss an application in the Wireless Radio Services if “premature or late filed, including applications filed prior to the opening date or after the closing date of a filing window, or after the cut-off date for a mutually exclusive application filing group.”). [↑](#footnote-ref-47)
46. Application for Review at 5-6; Reply at 4-5. [↑](#footnote-ref-48)
47. Application for Review at 6 (referring to 47 CFR § 73.870(e) (“Minor change LPFM applications may be filed at any time, unless restricted by the staff, and generally, will be processed in the order in which they are tendered.”)). [↑](#footnote-ref-49)
48. Application for Review at 6 (quoting *WKVE, Semora, North Carolina*, Memorandum Opinion and Order and Notice of Apparent Liability, 18 FCC Rcd 23411, 23423, para. 26 (2003) (*Semora*) (granting a modification application that was short-spaced to another station at the time of filing but became grantable prior to processing when the other station downgraded)). [↑](#footnote-ref-50)
49. *Id.* at 6. [↑](#footnote-ref-51)
50. Application for Review at 13, n.27 (citing 47 CFR § 73.3522 (“Minor modification of facilities in the non-reserved FM broadcast services . . . shall have the opportunity during the period specified in the FCC staff’s deficiency letter to correct all deficiencies in the tenderability and acceptability of the underlying application”) and *Family Stations, Inc.*, Memorandum Opinion and Order, 2022 WL 1201895 (2022) (“Under the Commission's liberal amendment policy [for auctionable services], processing staff should have issued a deficiency letter and afforded Family an opportunity to correct the Translator Application rather than dismiss the application.”)). [↑](#footnote-ref-52)
51. Application for Review at 6, n.13; Reply at 5. [↑](#footnote-ref-53)
52. Application for Review at 4-5. [↑](#footnote-ref-54)
53. *Id*. at 4. [↑](#footnote-ref-55)
54. Application for Review at 2-5, Reply at 9. The parties debate what the effect of KQEP-LP’s time-sharing status may have had on its exact expiration time. *Compare* Application for Review at 4 (arguing that as a time-share station, KQEP had no authority to operate past 3 pm on March 31, 2021, and therefore was not authorized when the Park Modification Application was filed) *with* Opposition at 7 (arguing that Park’s time-share argument is without legal basis, unsupported by precedent, and in any case untimely on review). As we determine the acceptability of the applications on other grounds, we need not consider this argument further here. [↑](#footnote-ref-56)
55. Application for Review at 3. [↑](#footnote-ref-57)
56. *Id*. at 7-8. [↑](#footnote-ref-58)
57. *Id*. at 3. [↑](#footnote-ref-59)
58. *Id.* at 9-11. [↑](#footnote-ref-60)
59. *Id*. at 10. [↑](#footnote-ref-61)
60. *Id.* at 11. [↑](#footnote-ref-62)
61. *Id*. [↑](#footnote-ref-63)
62. *Id*. at 11. [↑](#footnote-ref-64)
63. *Id*. at 12; Reply at 7-8. [↑](#footnote-ref-65)
64. Application for Review at 12; *see also* Reply at 7-8. [↑](#footnote-ref-66)
65. Specifically, Central Baptist agreed with the Bureau that: “(1) PPR failed to timely raise a 312(g) challenge to KQEP-LP’s license; (2) the Bureau amply justified its decision; (3) the evidence presented by PPR was insufficient to justify its claims; (4) the Bureau was not required to rely on unpublished precedent to grant PPR’s decision; (5) denying PPR the right to amend its dismissed application nearly one year after it was filed was not reversible error; (6) a compromise is not possible and is irrelevant to the issues of this case.” Opposition at iii. [↑](#footnote-ref-67)
66. Opposition at 10-11. [↑](#footnote-ref-68)
67. *Id*. at 11-12. [↑](#footnote-ref-69)
68. *Id*. at 13. On January 22, 2024, Park filed a Request for Leave to File Supplement to Application for Review (Request for Leave) and the Supplement to Application for Review (Supplement) (Pleading File No. 235960), arguing that the Media Bureau released a new letter decision, *Electron Benders*, that introduced “new facts and circumstances” that were pertinent to Park’s Application. *See* Request for Leave at 1 (citing *Electron Benders*, Letter Decision, 2023 WL 8889604, DA 23-1205 (MB Dec. 22, 2023) (*Electron Benders*)). On January 31, 2024, Central Baptist filed an opposition to the Request for Leave (Supplement Opposition) (Pleading File No. 237784). On February 12, 2024, Park filed a reply to the Supplement Opposition (Supplement Reply) (Pleading File No. 238807). In the series of “supplemental” pleadings, the parties debate the impact of a published Bureau decision released on December 22, 2023, *Electron Benders,* involving a different matter and different parties, which found that an applicant’s failure to correctly certify that it contacted the person possessing control of a proposed transmitter site or to provide contact information for such a person was not a “fatal defect” that could not be cured by subsequent amendment. In the Supplement, Park contends that this decision is “strikingly similar” to the instant case. Supplement at 6. In the Supplement Opposition, Central Baptist argues that *Electron Benders* is not binding precedent and that the Supplement is procedurally unacceptable because the arguments therein could have been made earlier by relying upon Commission precedent that is over 20 years old. *See* Supplement Opposition at 3-4 (citing *Semora*, 18 FCC Rcd at 23411). Central Baptist also asserts that *Semora* related to a “technical rule” while the instant case relates to “procedural rules.” Supplement Opposition at 3-5. In the Supplement Reply, Park argues that the Supplement is timely because it relies on a newly-released case and that the deficient short-spacing in the Park Modification Application is a technical, not a procedural, defect. Supplement Reply at 2. As a threshold matter, we note that Park’s Supplement to Application for Review is untimely because it was filed more than 30 days after notice of the action being challenged on review. *See* 47 CFR 1.115(d). Here, the Bureau’s *Reconsideration Letter* was issued on February 6, 2023, and Park’s Supplement was not filed until January 22, 2024. We will thus treat Park’s Request for Leave as a request for waiver of the filing deadline set forth in 47 CFR § 1.115(d). The Supplement seeks to report on a Bureau decision issued after the deadline for filing Applications for Review in this case. Because the Supplement and related pleadings exclusively relate to a Bureau-level decision that is not binding on the Commission, we find no good cause has been shown warranting further consideration of the Supplement, and thus we deny waiver of the deadline. *See Comcast Corp. v. FCC*, 526 F.3d 763, 769 (D.C. Cir. 2008) (affirming the “’well-established view that an agency is not bound by the actions of its staff if the agency has not endorsed those actions’”) (internal citations omitted). Furthermore, since, as explained herein, we are granting Park relief for reasons independent of the reasoning discussed in Park’s Supplement, the Supplement is also moot. For these reasons, we deny Park’s Request for Leave and dismiss Park’s Supplement. [↑](#footnote-ref-70)
69. Specifically, Park cites to Application File No. BMPL-20171115AAY (allowing an applicant who had previously requested a waiver to seek *nunc pro tunc* reinstatement after dismissal). [↑](#footnote-ref-71)
70. Reply at 1-7. [↑](#footnote-ref-72)
71. 47 CFR § 1.115(b)(2). [↑](#footnote-ref-73)
72. *See generally,* 47 CFR §§ 73.3573(e)-(f), 73.3564(e). [↑](#footnote-ref-74)
73. *See* 47 CFR § 73.870(e) (“Minor change LPFM applications may be filed at any time, unless restricted by the staff, and generally, will be processed in the order in which they are tendered”); *Creation of a Low Power Radio Service*, Sixth Order on Reconsideration, 28 FCC Rcd 14489, 14494, para. 13 n. 38 (“Amendments proposing new channels will be processed in accordance with established first-come, first-served licensing procedures”). This language reflects the phrasing of 47 CFR § 73.3564(e): “Applications for minor modification of facilities may be tendered at any time, unless restricted by the FCC. These applications will be processed on a “first come/first served” basis and will be treated as simultaneously tendered if filed on the same day. Any applications received after the filing of a lead application will be grouped according to filing date, and placed in a queue behind the lead applicant.” The first-come, first-served processing procedures are set forth in detail in sections 73.3573 and 73.3564. *See* 47 CFR §§ 73.3573(e)-(f) (“Processing FM broadcast station applications”), 73.3564(e) (“Acceptance of applications”). [↑](#footnote-ref-75)
74. *See* *Atlantic City Board of Education and Press Communications, LLC*, Memorandum Opinion and Order, 31 FCC Rcd 9380, 9384-85, para. 9 (2016) (affirmed on different grounds in *Press Commc’ns v. FCC*, 875 F.3d 1117 (D.C. Cir. 2017) and denied certiorari in 138 S.Ct 1560 (2018)). [↑](#footnote-ref-76)
75. *Broadcast Actions*, Public Notice, Report No. 49962 (April 7, 2021). [↑](#footnote-ref-77)
76. 47 CFR § 1.117(a) (providing the Commission with 40 days to review a Bureau-level action on its own motion). [↑](#footnote-ref-78)
77. *Reconsideration Letter* at 8-9, n.69 (holding that Park’s statement regarding KQEP-LP not operating for over a year was “unsupported by the record” and “did not warrant additional consideration or further investigation, especially when the parties (and Bureau) understood that the KQEP-LP license expired on April 1, 2021 . . . An investigation under these circumstances would have been a waste of administrative resources.”). [↑](#footnote-ref-79)
78. *Harrisonburg*, 29 FCC Rcd 5925, 5928. In the *Reconsideration Letter*, the Bureau misquoted *Harrisonburg* as applying to the expiration of a “license or construction permit.” *Reconsideration Letter* at 11, n.82. In fact *Harrisonburg* referred only to construction permits. [↑](#footnote-ref-80)
79. *See* 47 U.S.C. § 309(k). [↑](#footnote-ref-81)
80. *See* 47 CFR § 73.3566. [↑](#footnote-ref-82)
81. *Commission States Future Policy on Incomplete and Patently Defective AM and FM Construction Permit Applications*, Public Notice, 56 RR.2d 776 (1984) (as subsequently published in the Federal Register, 49 Fed. Reg. 47331, 47332 (Dec. 3, 1984)) (*Defective Applications Public Notice*). In the commercial FM service, applicants are not permitted to amend to cure defects after a staff denial of a waiver request. *See Amendment of Part 73 of the Commission’s Rules to Modify Processing Procedures for Commercial FM Broadcast Applications*, Report and Order, 7 FCC Rcd 5074, 5078-79, para. 22 (1992) (*Soft Look Order*). This restriction has not been applied to NCE applicants seeking *nunc pro tunc* reinstatement after a dismissal due to denial of a waiver request. For example, LPFM stations are permitted to amend applications that are initially dismissed for submitting a defective waiver request. *See Christian Charities Deliverance Church et al.*, Memorandum Opinion and Order, 30 FCC Rcd 10548, 10550, paras. 7-8 (2015) (permitting an applicant to amend *nunc pro tunc* after dismissal due to a deficient waiver request). Moreover, we note that in this case the Bureau did not substantively analyze Park’s waiver request but rather concluded that it was statutorily precluded from doing so and thus “dismiss[ed] [Park’s] waiver request without further consideration.” *See Staff Letter* at 10-11; *Reconsideration Letter* at 13 n.97. [↑](#footnote-ref-83)
82. *Id.*, 49 Fed. Reg. at 47332; *see also* *Premier Broadcasting, Inc*., Memorandum Opinion and Order, 7 FCC Rcd 867, 868 (1992) “grant of the South Coast petition for reconsideration returned its application to ‘pending and undecided’ status *nunc pro tunc* its original file date (July 12, 1985), thereby making the later-filed pending Montecito application ‘inconsistent,’ in violation of 47 C.F.R. § 73.3518.”). [↑](#footnote-ref-84)
83. *See BVM Helping Hands*, Memorandum Opinion and Order, 29 FCC Rcd 6464, 6465, para. 4 (2014) (holding that the Bureau “properly declined to take adverse action based solely on an application's earlier acceptability, when subsequent events [i.e., a change in applicable law] resulted in an acceptable application at the time of processing”); *Hampton Roads Educational Telecommunications Association, Inc.*, Memorandum Opinion and Order, 30 FCC Rcd 14906 (2015) (*Hampton Roads*)(accepting a curative amendment based on changed law and circumstances); *John Joseph McVeigh, Esq.*, Letter Decision, 25 FCC Rcd 3572, 3575 (MB 2010) (technical acceptability issues for an NCE applicant “can be cured while an application is pending or in connection with a timely filed petition for reconsideration. An applicant can amend its proposal or identify changed circumstances that eliminate the rule violation.”); *Semora,* 18 FCC Rcd at 23423, para. 26 (upholding the grant of a full service FM station modification application that failed to protect the licensed facilities of another station at the time of filing but where the short-spacing had been eliminated before staff acted on the application and explaining that “[o]ur broadcast licensing procedures do not require the return of applications that were unacceptable at the time of filing but which came into compliance with our technical rules prior to the deadline for corrective amendments. We will not take adverse action on [an application] based solely on its acceptability as filed, when subsequent events prior to staff review resulted in a fully acceptable application.”). [↑](#footnote-ref-85)
84. *Los Angeles Social Justice Radio Project*, Memorandum Opinion and Order, 31 FCC Rcd 7506, 7510, para. 7 (2016) (allowing a curative amendment specifying new coordinates for a post-window LPFM amendment and listing examples of fatal defects in LPFM applications, established by specific rule or policy, that cannot be cured by subsequent amendment); *Reexamination of the Comparative Standards and Procedures for Licensing Noncommercial Educational Broadcast Stations and Low Power FM Stations*, Report and Order, 34 FCC Rcd 12519, 12542-43, paras. 57-59 (2019). The D.C. Circuit has held that the Commission must provide “clear and explicit” notice if it wishes to treat a defect as incurable. *JEM Broadcasting Co., Inc. v. FCC*, 22 F.3d 320, 329 (D.C. Cir. 1994). [↑](#footnote-ref-86)
85. Under the previous “hard look” processing procedures, an applicant was not permitted to amend its application and retain its initial filing priority date. *Amendment of Sections 73.3572 and 73.3573 Relating to Processing of FM and TV Broadcast Applications*, Report and Order, MM Docket No. 84-750, FCC 85-125 (1985), *available at* [*https://docs.fcc.gov/public/attachments/FCC-85-125A1.pdf*](https://docs.fcc.gov/public/attachments/FCC-85-125A1.pdf)(last visited June 23, 2023) (*Hard Look Order*). Therefore, the first *non-defective* application filed would be granted. *Processing Procedures for Commercial FM Broadcast Applications*, Notice of Proposed Rulemaking, 6 FCC Rcd 7265, 7268, para. 29 (1991) (*Soft Look NPRM*). [↑](#footnote-ref-87)
86. *See Soft Look Order*, 7 FCC Rcd at 5074, para. 3. [↑](#footnote-ref-88)
87. *Id.* at 5078, para. 19 (quoting comments that “if the Commission intends to permit applicants to correct defects, then it is logical to retain the applicant’s place in the processing line.”). [↑](#footnote-ref-89)
88. *Semora,* 18 FCC Rcd at 23423, para. 26. [↑](#footnote-ref-90)
89. *See Reconsideration Letter* at 13. [↑](#footnote-ref-91)
90. *See, e.g., Creation of Low Power Radio Service*, Report and Order, 15 FCC Rcd 2205, 2209, para. 6 (2000) (“We are committed to creating a low power FM radio service only if it does not cause unacceptable interference to existing radio service”). [↑](#footnote-ref-92)
91. The Commission's rules may be waived for good cause shown. 47 CFR § 1.3. When an applicant seeks waiver of a rule, it must plead with particularity the facts and circumstances which warrant such action. *WAIT Radio v. FCC*, 418 F.2d 1153, 1157, para. 2 (D.C. Cir. 1969) (*WAIT Radio*). The Commission must give waiver requests “a hard look,” but an applicant for waiver “faces a high hurdle even at the starting gate.”  *WAIT Radio*, 418 F.2d at 1157, para. 2. Waiver is appropriate only if both (1) special circumstances warrant a deviation from the general rule, and (2) such deviation better serves the public interest. *NetworkIP, LLC v. FCC*, 548 F.3d 116, 125-128 (D.C. Cir. 2008) (citing *Northeast Cellular Telephone Co.*, 897 F.2d 1164, 1166 (1990)). [↑](#footnote-ref-93)
92. *See* Application for Review at 9-11. [↑](#footnote-ref-94)
93. *Comcast Corp. v. FCC*, 526 F.3d 763, 769 (D.C. Cir. 2008). [↑](#footnote-ref-95)
94. *65 Applications for Authority to Construct and Operate Multipoint Distribution Service Stations at Three Transmitter Sites*, 10 FCC Rcd 11162, 11175, ¶ 41 (1995) (“unexplained staff actions are not precedent to be followed”); *United States Cellular Operating Co. Compliance with Section 22.942 of the Commission's Rules in the Rockford, IL MSA*, 15 FCC Rcd 4372, 4378, ¶ 10) (2000) (grant of application by Public Notice without explanation did not serve as precedent). [↑](#footnote-ref-96)
95. *See Reconsideration Letter* at 13. [↑](#footnote-ref-97)
96. *Reconsideration Letter* at 13. In *Melody Music*, the Court examined two renewal applications that were considered “at virtually the same time” and raised similar issues, granting one and denying the other without analyzing the differences or similarities between them.  *Melody Music*, 345 F. 2d at 732-733. The D.C. Circuit held that the Commission must treat similarly situated applicants similarly or explain the reasoning for differential treatment. *Id*. [↑](#footnote-ref-98)
97. *See, e.g., Creation of Low Power Radio Service*, Report and Order, 15 FCC Rcd 2205, 2233, para. 7 (2000). [↑](#footnote-ref-99)
98. Although the issue of Park’s inability to file an amendment was raised for the first time in the Application for Review, we find that the public interest is served by consideration of this issue and therefore waive 47 CFR § 1.115(c) on our own motion. *See* *Beasley Broadcast Group Inc.*, Memorandum Opinion and Order, 23 FCC Rcd 15949, n.37 (2008). *See also* 47 U.S.C. § 155(c)(4) (providing for Commission review on its own initiative). After careful review of the history of this proceeding, we conclude that Park was entitled to—and as a matter of factual record attempted to obtain earlier in the proceeding—*nunc pro tunc* treatment. [↑](#footnote-ref-100)
99. Opposition at 11-12. [↑](#footnote-ref-101)
100. In light of our actions taken herein, we direct the Bureau, when it processes the Park Application, to review and consider all remaining issues going to technical or legal grantability, including any matters that were raised in the initial Petition to Deny. [↑](#footnote-ref-102)
101. *See* 47 U.S.C. § 312(g). Because we grant the Application for Review on grounds that the Bureau did not correctly apply Commission policy regarding the filing of defective minor modification applications, we do not address Park’s other arguments that there is no rule providing for the dismissal of minor change applications filed prematurely or that a compromise could be reached with Central Baptist. [↑](#footnote-ref-103)
102. 47 U.S.C. § 155(c)(5). [↑](#footnote-ref-104)
103. 47 CFR § 1.115(g). [↑](#footnote-ref-105)
104. 47 U.S.C. § 155(c)(6). [↑](#footnote-ref-106)
105. 47 CFR § 1.115(h)(1)(i). [↑](#footnote-ref-107)