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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In re	)	
	)	
JERRY SZOKA	)	CIB Docket No. 98-48
Cleveland, Ohio	)	
	)	
Order to Show Cause Why	)	
a Cease and Desist Order	)	
Should Not Be Issued	)	

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FEDERAL COMMUNICATIONS COMMISSION
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To: The Commission

COMPLIANCE AND INFORMATION BUREAU'S OPPOSITION TO JERRY SZOKA'S PETITION FOR RECONSIDERATION

1. Pursuant to Section 1.106(g) of the Commission's Rules ("the Rules"), 47 C.F.R. § 1.106(g), the Chief, Compliance and Information Bureau ("the Bureau"), by his attorneys, submits the following opposition to the Petition for Reconsideration ("Petition") filed by Jerry Szoka ("Szoka") on July 15, 1999. Szoka's Petition seeks reconsideration of the Commission's *Decision,* FCC 99-145, released June 15, 1999, which affirmed the *Summary Decision*, FCC 98D-3, released September 4, 1998, by Chief Administrative Law Judge Joseph Chachkin ("ALJ") ordering Jerry Szoka ("Szoka") to cease and desist from operating an unauthorized broadcast station in violation of Section 301 of the Communications Act of 1934, as amended, 47 U.S.C. § 301, and to pay a monetary forfeiture of $11,000 for operating in violation of Section 301.

2. In support of his Petition Szoka sets forth four contentions. Szoka contends that he has standing to challenge the Commission's licensing scheme; that the Commission failed to

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address his constitutional objections; that the $11,000 forfeiture is excessive and unconstitutional; and that the Commission should reduce the forfeiture based on his inability to pay it. His Petition also contains a request that the Commission stay its order that he cease and desist from making unauthorized radio transmissions in violation of Section 301 pending completion of the Low Power FM rulemaking,[1] and approval of his license application that he plans to submit subsequent to his Petition. The Bureau submits the following comments in opposition to Szoka's Petition.

3. Section 1.44(e) of the Rules provides that "[a]ny request to stay the effectiveness of any decision or order of the Commission shall be filed as a **separate** pleading. Any such request that is not filed as a separate pleading will not be considered by the Commission." 47 C.F.R. § 1.44(e) (emphasis added). Because Szoka's request for stay is contained within his Petition and not a separate pleading as required by Section 1.44(e) of the Rules, the request for stay is procedurally defective, and as such, should not be considered by the Commission. *See Orange Nine, Inc., et al.*, 10 FCC 2d 715, 717 (1967); *Applications for A and B Block Broadband PCS Licenses*, 11 FCC Rcd 3229 (WTB 1995).

4. Section 1.106(n) of the Rules states that "upon good cause shown, the Commission will stay the effectiveness of its order or requirement pending a decision on the petition for reconsideration." 47 C.F.R. § 1.106(n). Assuming *arguendo*, if the Commission chooses to consider the request for stay, Szoka's petition has failed to articulate the elements necessary to support his request or provide evidence in support thereof. *See Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 673-74 (D.C. Cir. 1985) (*per curiam*); *See also Washington*

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[1] *Creation of a Low Power Radio Service,* 14 FCC Rcd 2471(1999) ("*LPFM Rulemaking*").

Metropolitan Area Transit Commission v. Holiday Tours, Inc., 559 F.2d 841, 842-43 (D.C. Cir. 1977); *Virginia Petroleum Jobbers Association v. Federal Power Commission*, 259 F.2d 921, 925 (D.C. Cir. 1958).[2] It is unclear on what Szoka bases the contention in his petition that "the Commission correctly recognized that Szoka's broadcasting activities serve a vital public interest,..." The Commission's *Decision* states that, even if Szoka's contention that he serves the public interest were valid, his contention does not give him the right to broadcast without a license. The *Decision* also found that Szoka admitted to operating an unlicensed station in violation of Section 301 of the Act. Szoka cannot now use his request for stay to contravene the Communications Act and the Commission's Rules. Szoka asks for a stay pending the outcome of the *LPFM Rulemaking* or in the alternative, until the Commission reviews his application for a license that he has yet to file. The outcome of a pending rulemaking proceeding cannot negate the illegality of Szoka's past and present conduct. Moreover, a request for a stay cannot be granted based upon the possibility that Szoka might file an application. Thus, even if the stay is examined on the merits, the Commission should deny his request because he fails to provide sufficient evidence in support thereof.

5. Turning to the petition, Szoka's petition fails to meet the criteria for reconsideration of a Commission decision. The petition repeats the same contentions that are mentioned in the *Summary Decision* and *Decision*.[3] Moreover, Szoka's petition has taken

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[2]Szoka has not met the four-factor test for granting a stay required under *Wisconsin Gas Co.* Under that test, Szoka must demonstrate: (1) that he is likely to prevail on the merits; (2) that he will suffer irreparable harm if his stay request is not granted; (3) that other interested parties will not be harmed if the stay is granted; and (4) that the public interest favors grant of the stay.

[3] We note that Szoka's Petition also includes documentation regarding his ability to pay the forfeiture. Ability to pay, in and of itself, is not a reason for reconsideration, *see* 47 C.F.R. § 1.106, but can be

liberties in characterizing the *LPFM Rulemaking*, but the contentions made by Szoka essentially repeat the contentions made previously and thoroughly addressed by the *Decision*. Although Szoka's petition now construes the Commission's *LPFM Rulemaking* as conceding that "Szoka can operate in the public interest without causing harmful interference [,]"[4] the *LPFM Rulemaking* specifically seeks information on the question of whether licensing stations at 10, 100 or 1,000 watts may cause interference. Even in the *Decision*, the Commission stated that the rules contemplated by the *LPFM Rulemaking* "are prospective in nature, of course, and are totally separate from the Commission's repeated efforts, as here, to terminate all unlicensed radio operations." *Decision* at ¶ 19. Moreover, the Commission has not yet decided whether parties, like Szoka, who have persisted in unlawful broadcast operations, even after Commission officials have issued repeated warnings and the Commission has initiated enforcement action, possess the requisite character qualifications to be eligible for a license in any new radio service. *Decision* at ¶ 19. Inasmuch as Szoka's petition fails to meet any of the criteria for reconsideration, the Commission should dismiss the petition as repetitious, or, in the alternative, deny the petition on the merits. 47 C.F.R. §1.106.

6. Regarding the forfeiture, Szoka claims that he cannot pay the forfeiture and provides individual tax returns for three years in support of this claim. In light of the egregiousness and the duration of the violation that continues, the Bureau believes that the forfeiture amount should be upheld.

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considered by the Commission when raised, 47 U.S.C. § 503(b)(2)(D). The *Decision* at note 7, permitted the submission of such information within thirty days of its release. For the reasons discussed in this Opposition, the Bureau believes that the forfeiture amount should not be reduced.

[4]Petition at page 11.

7. While his tax returns indicate that he is self-employed, his supplemental declaration in support of the Petition raises questions that warrant consideration of additional financial information. His supplemental declaration indicates that he holds a 37% interest in a club owned by McCormick and Associates, an S corporation, and his interest in the corporation has no current market value. Szoka's declaration also indicates a 1/12 interest in a commercial building in which his interest "is not marketable and has no current market value." Yet the personal financial statement also submitted by Szoka, dated July 13, 1999, indicates, *inter alia*, that his unpaid taxes include property taxes. His financial statement also indicates that Szoka owes federal taxes, yet his federal tax returns indicate a refund for each of the three years. Thus, the documented financial information provided raises additional questions rather than resolving the issue of ability to pay. Without additional documentation that can resolve these issues, the Bureau opposes any reduction based on the issue of Szoka's ability to pay.

8. For the above noted reasons, the request for stay should be dismissed or, in the alternative, denied. Furthermore, the Petition should be dismissed or, in the alternative, denied.

Also, the *Decision* by the Commission ordering Szoka to cease and desist from his broadcasting without a license and assessing the forfeiture of $11,000 should be upheld.

Respectfully submitted,

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July 26, 1999

CERTIFICATE OF SERVICE

I, Deborah Hannah, certify that I have on this 26th day of July, sent by regular United States mail, a copy of the foregoing "Compliance and Information Bureau's Opposition to Jerry Szoka's Petition for Reconsideration" to:

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