



Federal Communications Commission
Washington, D.C. 20554

July 13, 2009

DA 09-1523

In Reply Refer To:

1800B3-RA

Released: July 13, 2009

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

Dear Counsel:

We have before us the Petition for Reconsideration (“Petition”), filed on February 17, 2009, by Mariana Broadcasting, Inc. (“Mariana”), licensee of daytime-only AM Station WGHT(AM), Pompton Lakes, New Jersey. Mariana seeks reinstatement of the cancelled license of FM Translator Station DW276BX, Pompton Lakes, New Jersey (“Station”),¹ formerly held by New Jersey Public Broadcasting Authority (“Licensee”). We dismiss the Petition for the reasons set forth below.

Background. On November 18, 2008, Licensee requested voluntary cancellation of its license for Translator Station DW276BX. The staff granted Licensee’s request and announced cancellation of the license by Public Notice on January 16, 2009.² On February 17, 2009, Mariana filed the 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 Mariana simultaneously filed an application for special temporary authorization (“STA”) to operate the Station, pending negotiations for assignment of the Station license (assuming its reinstatement) from Licensee to Mariana.

In its Petition, Mariana states that WGHT(AM) is the only full-power station in any service licensed to the community of Pompton Lakes, New Jersey. As such, it claims that it has a “uniquely local focus,” providing its residents with information on local news and events, as well as emergency information.⁴ As a daytime-only station, however, Mariana states that “when the sun sets, the 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”⁵

¹ *Broadcast Actions*, Public Notice, Report No. 46904 (Jan. 16, 2009) at 1 (“*Public Notice*”).

² *Id.*

³ Petition at 1.

⁴ *Id.* at 2.

⁵ *Id.* at 2.

Mariana states that it has been unable to expand beyond its current daytimer status without creating nighttime interference to other stations.⁶ However, it argues that reinstatement of the Station license and grant of its STA request would allow it to provide local news, information, and weather alerts “around the clock.”⁷ Such action, it maintains, “would be in keeping with the Commission’s long-standing commitment to expanding localism”⁸ and would provide “enhanced local and public safety benefits” to the Pompton Lakes community.⁹

Discussion. Section 405(a) of the Communications Act of 1934, as amended (“Act”), states that any party to an order, decision, report, or action, or any other person aggrieved or whose interests are adversely affected, may petition for reconsideration.¹⁰ In order to show standing, a petitioner who is not a party to the proceeding must: (1) state with particularity the manner in which its interests are adversely affected by the action taken, and (2) show good reason why it was not possible to participate in the earlier stages of the proceeding.¹¹ To determine if a party's interests have been adversely affected, the Commission frequently relies upon a three-pronged standing test under which a party must establish: (1) a distinct and palpable injury-in-fact that is (2) traceable to the respondent's conduct and (3) redressable by the relief requested.¹²

Mariana asserts that it has standing to petition for reconsideration as a local competitor, a potential assignee, or a listener.¹³ We disagree. Regardless of its designation, Mariana fails on all counts to introduce any evidence suggesting that its interests have been “adversely affected” by the voluntary cancellation of the Station license. While we acknowledge Mariana’s desire to expand coverage of its local programming to its community to include 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.

⁶ *Id.* at 4-5.

⁷ *Id.* at 7. The Commission recently issued a Report and Order permitting AM daytime-only stations to originate programming on FM translators at night. *Amendment of Service and Eligibility Rule for FM Broadcast Translator Stations*, Report and Order, FCC 09-59 (*rel.* June 29, 2009). Prior to release of the order, while the rulemaking proceeding considering this change was pending, the Commission granted some STA requests permitting AM daytime-only stations to originate programming on FM translators at night.

⁸ Petition at 8.

⁹ *Id.* at 9. Mariana also attaches 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 8th District, New Jersey.

¹⁰ 47 U.S.C. § 405(a).

¹¹ 47 C.F.R. § 1.106(b)(1).

¹² See *Weblink Wireless, Inc.*, Order on Reconsideration, 17 FCC Rcd 24642 (WTB 2002); *AT&T Corp. v. Business Telecom, Inc.*, Order on Reconsideration, 16 FCC Rcd 21750 (2001); *Chris C. Hudgins*, Order on Reconsideration, 16 FCC Rcd 7941 (WTB 2001).

¹³ Petition at 1.

Moreover, even if we were to assume that Mariana had standing, we would be unable to provide the relief requested, namely, reinstatement of the Station license to Licensee. The Commission has no authority to require any party to assume a license and the corresponding duties and responsibilities that inhere in assuming the role of a licensee.¹⁴ In order to affect the potential assignment Mariana seeks, we would be required to return the Station license to New Jersey Public Broadcasting Authority. Since the Commission cannot force a license upon a party, any injury Marianna may have suffered is not redressable by the relief requested.

In addition, were we to grant Mariana's petition, we would violate the procedural rights of other potential applicants who may have an interest in Station DW276BX or a facility precluded by the reinstatement of this license. The Supreme Court held in *Ashbacker Radio Corp.* that, where two parties' applications are mutually exclusive, to grant one application without first considering the other application was to deny the second applicant the procedural right to a hearing granted to it by Congress.¹⁵ The Court subsequently clarified that the due process rights established in *Ashbacker* also protect *potential* applicants that could not file competing proposals due to an application freeze.¹⁶ Thus, we would be unable to act on Mariana's request without first affording a filing opportunity for other interested parties. We decline to depart from our well established national filing window approach to consider competing proposals for a single FM translator authorization. Should Mariana choose to pursue a new FM translator in Pompton Lakes, NJ, it may do so when the Commission opens the next filing window for non-reserved band FM translators.

Conclusion. For the foregoing reasons we find Mariana lacks standing in this matter. Therefore, the Petition for Reconsideration of Cancellation of License filed by Mariana Broadcasting, Inc. on February 17, 2009, is DISMISSED.

Sincerely,

Peter H. Doyle
Chief, Audio Division
Media Bureau

cc: New Jersey Public Broadcasting Authority
Mariana Broadcasting, Inc.

¹⁴ See generally 47 U.S.C. § 303 (describing powers and duties of the Commission).

¹⁵ *Ashbacker Radio Corp. v. F.C.C.*, 326 U.S. 327, 333 (1945).

¹⁶ *Bachow Commc'ns, Inc. v. F.C.C.*, 237 F.3d 683, 689 (D.C. Cir. 2001) (citing *Kessler v. F.C.C.*, 326 F.2d 673 (D.C. Cir. 1963)).