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In re: W263AQ, Mattoon, IL
Facility ID No. 85639
The Cromwell Group, Inc. of Illinois
File No. BPFT-20101025ABR

Dear Counsel:

We have before us the referenced application ("Application") and accompanying request for waiver of Section 74.1233(a)(1) of the Commission's Rules ("Rules"),[1] filed by The Cromwell Group, Inc. of Illinois ("Cromwell"). The Application proposes to modify the license of translator station W263AQ, Mattoon, Illinois, to specify a new transmitter site in Effingham, Illinois. For the reasons discussed below, we grant the waiver request and the Application.

Background. Cromwell proposes to move its transmitter to a new site in Effingham so that W263AQ can serve as a fill-in translator for WCRA(AM), Effingham, Illinois.[2] Its proposal does not qualify as a minor change under Section 74.1233(a) of the Rules, which requires that the 60 dBu contours of the existing and proposed FM translator facilities overlap. Cromwell maintains that waiver of this Rule would be in the public interest because W263AQ will provide fill-in service for an AM station in a "reasonable time," will "avoid unnecessary and onerous translator move expenses," and will "preserve Commission staff resources that would otherwise be required to process several interim step applications" under current processing standards.[3] As an additional basis for waiver, Cromwell notes that the proposal would qualify as a minor change under the less restrictive full-service processing rules.[4] Finally, it maintains that a waiver grant in this instance would be consistent with Commission action in other contexts where it has considered waiver of the minor change Rules to be in the public interest.[5]

[1] *See* Application at Exhibit 12 ("Waiver Request").

[2] WCRA(FM) is licensed to Two Petaz, Inc. Cromwell and Two Petaz, Inc., are both 100 percent owned by Bayard H. Walters.

[3] Waiver Request at 1.

[4] *Id*. at 1-2.

[5] *Id*. at 2. For example, Cromwell notes that Section 74.1233(e)(2) of the Rules permits the Commission to select non-adjacent channels to resolve conflicts between mutually exclusive reserved band translator proposals. It notes that an application channel change would otherwise be considered a major change but that the Commission "under the public interest standard determined that what could otherwise be a strict application of the minor change rules should be inapplicable in such a situation." As another example of "an instance where minor change rules for FM

Discussion. An applicant seeking waiver of a Rule has the burden to plead with particularity the facts and circumstances that warrant such action.[6] Thus, an applicant for waiver "faces a high hurdle even at the starting gate."[7] Although the Commission must consider carefully all waiver requests, such requests must be supported by a compelling showing in order to be granted.[8] A waiver from the Commission is appropriate if special circumstances[9] warrant a deviation from the general rule, and such deviation would better serve the public interest than strict adherence to the general rule.[10] Generally, the Commission may grant a waiver of its rules in a particular case only if the relief requested would not undermine the policy objective of the rule in question, and would otherwise serve the public interest.[11]

As discussed in more detail below, we find that grant of Cromwell's waiver request is in the public interest given the narrowly tailored facts of this case, namely that: (1) Cromwell does not have a history of filing serial minor modification applications; (2) the proposed site is mutually exclusive to its licensed facility; (3) the proposed move does not implicate the concerns raised by the Commission in the recent *Third Further Notice* in the low-power FM ("LPFM") docket,[12] and, (4) while not alone dispositive, the translator will be rebroadcasting an AM station.

No History of Translator "Hops." Section 74.1233(a) of the Rules provides that "any change in antenna location where the station would not continue to provide 1 mV/m service to some portion of its previously authorized 1 mV/m service area" would be considered a "major change in the facilities of authorized stations."[13] Applications for major modifications of existing facilities can only be filed during filing windows.[14]

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stations are not strictly adhered to," it notes that mutual exclusivity between an existing and proposed FM facility is not required for the "long-established policy" of permitting full power stations to implement non-adjacent channel upgrades where there is a demonstration that another equivalent channel is available for other parties. Waiver Request at 2.

[6] *See Columbia Communications Corp. v. FCC,* 832.F.2d 189, 192 (D.C. Cir, 1987) (citing *Rio Grande Family Radio Fellowship, Inc. v. FCC*, 406 F.2d 644, 666 (D.C. Cir. 1968)).

[7] *See WAIT Radio v. FCC,* 418 F.2d 1153, 1157 (D.C. Cir. 1969), *aff'd*, 459 F.2d 1203 (1972), *cert. denied*, 93 S.Ct. 461 (1972) ("*WAIT Radio*") (finding that the Commission may decide in some instances that rule waiver serves the public interest if an applicant's proposal will not undermine the policy served by the rule). *See also Thomas Radio v. FCC,* 716 F.2d 921, 924 (D.C. Cir. 1983).

[8] *Greater Media Radio Co., Inc.*, Memorandum Opinion and Order, 15 FCC Rcd 7090 (1999) (citing *Stoner Broadcasting System, Inc.*, Memorandum Opinion and Order, 49 FCC 2d 1011, 1012 (1974)).

[9] *See, e.g., Gulf Coast Community College*, 20 FCC Rcd 17157 (MB 2005) (finding special circumstances present for waiver of a Form 301 filing deadline, but issuing a Notice of Apparent Liability for failure to timely file the application).

[10] *See Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990); *see also WAIT Radio*, 418 F.2d at 1159 (stating that the Commission may take into account considerations of hardship, equity, or more effective implementation of overall policy on an individual basis).

[11] *WAIT Radio*, 418 F.2d at 1157.

[12] *Creation of a Low Power Radio Service*, Third Further Notice of Proposed Rulemaking, FCC 11-105, 2011 WL 2722585 (rel. Jul. 12, 2011) ("*Third Further Notice*").

[13] 47 C.F.R. § 74.1233(a)(1).

[14] *See* 47 CFR §§ 74.1233(b)(3) (reserved band) and (d)(2)(i) (non-reserved band).

Some translator licensees have attempted to accomplish what would otherwise be dismissed as an impermissible major change under Section 74.1233(a) by filing serial minor modification applications to "hop" to new locations that are sometimes over 100 miles away. We believe the filing of serial modification applications represents an abuse of process.[15] We recently entered into a consent decree with a party that acknowledged this practice was an abuse of process and agreed to forfeit several authorizations.[16] The purpose of the overlap requirement is "[t]o prevent … FM translator stations from abandoning their present service areas."[17] The evident purpose of the serial applications is to achieve the prohibited result. No rule specifically prohibits such a practice, but the Commission can take appropriate enforcement action, including denial of applications that are intended to evade the requirement or subvert its purpose pursuant to Section 308(a) of the Communications Act of 1934, as amended, on the ground that grant would not serve the public interest.[18]

Serial applications also implicate *Ashbacker*.[19] *Ashbacker* requires that the Commission "use the same set of procedures to process the applications of all similarly situated persons who come before it seeking the same license," [20] and *Ashbacker* rights "inhere in potential applicants whose right to file a timely competing application is frustrated by a Commission freeze order."[21] The window filing restriction for FM translator major changes is analogous to a freeze. Applicants who could have filed timely competing applications but for that restriction would have a good argument that grant of applications outside of the window abrogates their *Ashbacker* rights.[22] The Commission may limit eligibility to file competing applications when such action promotes the public interest,[23] and the Commission has justified doing so with regard to minor changes in the FM translator service on several grounds, including: (1) streamlined procedures are more appropriate and efficient for changes that are "technical and minor" in nature,[24] and (2) other prospective applicants will not be unfairly prejudiced because they can "predict whether other area stations have the potential to seek facilities increases based on applicable contour protection requirements and … file first for enhanced facilities."[25] Serial applications do not share these characteristics, however. They are not "technical and minor" in nature, and other prospective applicants cannot predict licensees' ultimate proposals because they have no technical relationship to the existing facilities. Under the circumstances, it is not evident that the

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[15] *See Amendment of Sections 1.420 and 73.3584 of the Commission's Rules Concerning Abuses of the Commission's Processes*, Notice of Proposed Rulemaking, 2 FCC Rcd 5563 ¶ 2 (1987) ("We believe that 'abuse of process' may be characterized as any action designed or intended to manipulate or take improper advantage of a Commission process, procedure or rule in order to achieve a result which that process, procedure or rule was not designed or intended to achieve; or to subvert the underlying purpose of that process, procedure or rule.").

[16] *Broadcast Towers, Inc*., Order and Consent Decree, 26 FCC Rcd 7681, 7686 (MB 2011).

[17] *1998 Biennial Regulatory Review*, Notice of Proposed Rulemaking, 13 FCC Rcd 14859, 14872 ¶ 50 (1998). *See 1998 Biennial Regulatory Review*, First Report and Order, 14 FCC Rcd 5272, 5277 ¶ 8 (1999).

[18] 47 U.S.C. § 308(a).

[19] *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327 (1945) ("*Ashbacker*").

[20] *Maxcell Telecom Plus, Inc. v. FCC*, 815 F.2d 1551, 1555 (D.C. Cir. 1987). *See Committee for Effective Cellular Rules v. FCC*, 53 F.3d 1309, 1321 (D.C. Cir. 1995) ("the ability to compete on an equal basis … is the essence of *Ashbacker*.").

[21] *Bachow v. FCC*, 237 F.3d 683, 690 n. 7 (D.C. Cir. 2001).

[22] *See id.* at 689, discussing *Kessler v. FCC*, 326 F.2d 673 (D.C. Cir. 1963).

[23] *See Aeronautical Radio, Inc. v. FCC*, 928 F.2d 428, 431 (D.C. Cir. 1991).

[24] *See 1998 Biennial Review*, 14 FCC Rcd at 5277 ¶ 7.

[25] *1998 Biennial Review*, 13 FCC Rcd at 14871-72 ¶ 49.

Commission would have a legitimate reason to limit competitive filing opportunities by treating the serial applications as minor changes. Accordingly, we believe that doing so violates "the essence of *Ashbacker*." [26]

Based on the record before us, Cromwell does not have a history of filing serial modification applications, and presently is not attempting to relocate its transmitter to Effingham via such "hops." Thus, he is not disqualified from seeking a waiver of Section 74.1233(a)(1) of the Rules. [27]

Mutual Exclusivity. Cromwell next maintains that waiver is justified because its current and proposed facilities remain mutually exclusive to one another.[28] The translator minor modification rule is more restrictive than the general full-power minor change rule, where it is sufficient that the two proposals be mutually exclusive. When coupled with the fact that Cromwell has not previously filed serial minor modification "hops," we agree that mutual exclusivity of the proposed and licensed facilities further support a waiver grant. The Commission has reasoned in a different context that:

> [W]here the new allotment is mutually exclusive with the existing one, foreclosing competing applications does not, as a practical matter, deprive potential applicants of opportunities for comparative consideration. Under our rules such potential applicants already are precluded from requesting such a new allotment because of the mutual exclusivity with the existing one. Moreover, … under our existing policy, they will rarely, if ever, have the opportunity to file a competing application in response to a request by the existing licensee for a change in community of license because the potential for such a competing application discourages the filing of such requests by competing licensees.[29]

We believe the same rationale applies here. However, where there is no mutual exclusivity, and absent some other legitimate justification for limiting the ability to compete equally, we believe that the minor change treatment of FM translator applications would abrogate the *Ashbacker* rights of potential competing applicants.

Concerns Raised in the LPFM Third Further Notice. While not asserted by Cromwell, we note that its proposed move to Effingham would not foreclose future licensing opportunities in the LPFM service, and find that this factor also weighs in favor of a waiver grant. In the LPFM *Third Further Notice*, the Commission found that certain temporary restrictions on the modification of translator stations were necessary to preserve LPFM licensing opportunities in identified spectrum-limited markets, and directed the Media Bureau to suspend the processing of any translator modification application that proposed a transmitter site for the first time within those markets.[30] Effingham is not in an Arbitron-rated market, and was not otherwise identified in the *Third Further Notice* as a spectrum-limited market. Thus, we find that Cromwell's proposal does not implicate the concerns raised about LPFM spectrum availability in the *Third Further Notice*.

Fill-in for AM Station. Cromwell proposes to change the transmitter site for Station W263AQ and rebroadcast primary Station WCRA(AM), Effingham, Illinois, as an AM fill-in translator. In 2009, the Commission authorized the use of certain FM translators to rebroadcast the signal of a local AM

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[26] *Committee for Effective Cellular Rules*, 53 F.3d at 1321.

[27] *WKVE*, Memorandum Opinion and Order and Notice of Apparent Liability, 18 FCC Rcd 23411, 23416 (2003) (discussing the doctrine of unclean hands, where wrongdoers are not entitled to equitable relief).

[28] Specifically, Cromwell states that the existing and proposed facilities are mutually exclusive using the "sum of the distances to the co-channel proposed and existing interfering and protected contours." Waiver Request at 2.

[29] *Amendment of the Commission's Rules Regarding Modification of FM and TV Authorizations to Specify a New Community of License*, 4 FCC Rcd 4870, 4873 (1989) (subsequent history omitted).

[30] *Third Further Notice*, 2011 WL at *11, ¶ 31.

station.[31] This deregulatory measure has been an unqualified success. Approving Cromwell's proposed arrangement is consistent with our continued efforts to revitalize the AM service and to make the most efficient use of limited spectrum. While this factor alone may be insufficient to justify a waiver grant, we find that, when combined with the other factors discussed above, the public interest would best be served by granting Cromwell's waiver request.

Conclusion/Action. Accordingly, for the reasons discussed above, IT IS ORDERED that Section 74.1233(a)(1) of the Commission's Rules IS WAIVED to the extent indicated, and that the application of The Cromwell Group, Inc. of Illinois (File No. BPFT-20101025ABR) to relocate W263AQ's transmitter from Mattoon to Effingham, Illinois, IS GRANTED.

Sincerely,

Peter H. Doyle
Chief, Audio Division
Media Bureau

cc: The Cromwell Group, Inc. of Illinois

[31] *See Amendment of Service and Eligibility Rules for FM Broadcast Translator Stations*, Report and Order, 24 FCC Rcd 9642 (2009).