



Federal Communications Commission
Washington, D.C. 20554

June 1, 2012

DA 12-866

In Reply Refer to:
1800B3-ATS

Russell M. Perry
Perry Publishing & Broadcasting Company, Inc.
1457 NE 23rd
Oklahoma City, OK 73111

In re: FM Translator K221FQ
Facility ID No. 77231
Perry Broadcasting Company, Inc.
File No. BPFT-20120217ABF

Dear Mr. Perry:

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 Perry Broadcasting Company, Inc. (“Perry”). The Application proposes to modify the license of translator station W263AQ, Edmond, Oklahoma (“Station”), to specify a new transmitter site in Oklahoma City, Oklahoma. For the reasons discussed below, we grant the waiver request and the Application.

Background. The Station was previously licensed to Magpie Communications of Oklahoma, LLC (“Magpie”), which acquired the Station on April 8, 2010.² During the twenty months in which Magpie was licensee of the Station, it filed six separate minor modification applications to change the Station’s transmitter site and channel.³ Magpie subsequently assigned the Station’s license to Perry on February 17, 2012.⁴

Perry filed the Application immediately upon the consummation of the license assignment. It requests a waiver of Section 74.1233(a)(1) of the Rules to move its transmitter to a new site in Oklahoma City so that K221FQ can serve as a fill-in translator for commonly-owned KRMP(AM), Oklahoma City, Oklahoma. 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. Perry maintains that a rule waiver 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.⁵

Perry maintains that the requested waiver meets the waiver standards set forth in *Cromwell Group, Inc. of Illinois*.⁶ Perry contends that the “*Mattoon*” waiver standard considers only those minor changes proposed by “the applicant.” Thus, as the new Station owner it claims that the Commission should not consider Magpie’s modification application filings. Additionally, Perry argues that it should

¹ See Application at Exhibit 12 (“Waiver Request”).

² See File No. BALFT-20100115ADC.

³ See File Nos. BPFT-20100412APB, BPFT-20100806AAV, BPFT-20101112ABY, BPFT-20100224AAQ, BPFT-20110628ABB, BPFT-20111101ALD.

⁴ See File No. BALFT-20111026AHD.

⁵ Waiver Request.

⁶ *The Cromwell Group, Inc. of Illinois*, Letter, 26 FCC Rcd 12685 (MB 2011) (“*Mattoon*”).

not be penalized for Magpie's serial relocations.⁷ Finally, Perry claims that it satisfies each of the remaining *Mattoon* waiver criteria.

Discussion. The Commission's rules may be waived only for good cause shown.⁸ An applicant seeking a rule waiver has the burden to plead with particularity the facts and circumstances that warrant such action.⁹ The Commission must give waiver requests "a hard look," but an applicant for waiver "faces a high hurdle even at the starting gate"¹⁰ and must support its waiver request with a compelling showing.¹¹ The Commission may exercise its discretion to waive a rule where the particular facts make strict compliance inconsistent with the public interest.¹² In addition, the Commission may take into account considerations of hardship, equity, or more effective implementation of overall policy on an individual basis.¹³ However, waiver of the Commission's rules is appropriate only if both (i) special circumstances warrant a deviation from the general rule, and (ii) such deviation will serve the public interest.¹⁴

We have previously granted Section 74.1223(a) "*Mattoon*" waivers where an applicant has demonstrated that: (1) it does not have a history of filing "serial" minor modification applications; (2) the proposed facility is mutually exclusive to its licensed facility; (3) the proposed move does not implicate the concerns raised by the Commission in the recent orders in the low power FM ("LPFM") docket,¹⁵ and, (4) while not alone dispositive, the translator will rebroadcast an AM station.¹⁶

Waiver Criteria. 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."¹⁷ The purpose of this overlap requirement is "[t]o prevent ... FM translator stations from abandoning their present service areas."¹⁸ Applications for major modifications of existing facilities can only be filed during filing windows.¹⁹ 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.

⁷ *Id.* at 2.

⁸ 47 C.F.R. § 1.3.

⁹ 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)).

¹⁰ 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*"). See also *Thomas Radio v. FCC*, 716 F.2d 921, 924 (D.C. Cir. 1983).

¹¹ *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)).

¹² *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) ("*Northeast Cellular*").

¹³ *WAIT Radio*, 418 F.2d at 1159; *Northeast Cellular*, 897 F.2d at 1166.

¹⁴ *NetworkIP, LLC v. FCC*, 548 F.3d 116, 125-128 (D.C. Cir. 2008); *Northeast Cellular*, 897 F.2d at 1166.

¹⁵ *Creation of a Low Power Radio Service*, Third Further Notice of Proposed Rulemaking, 26 FCC Rcd 9986 (2011) ("*Third Further Notice*"); Fourth Report and Order and Third Order on Reconsideration, FCC 12-29, 2012 WL 940640 (rel. Mar. 19, 2012) ("*Fourth Report and Order*").

¹⁶ *Mattoon*, 26 FCC Rcd at 12686.

¹⁷ 47 C.F.R. § 74.1233(a)(1).

¹⁸ *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).

¹⁹ See 47 CFR §§ 74.1233(b)(3) (reserved band) and (d)(2)(i) (non-reserved band).

No rule specifically prohibits this 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.²⁰ As we stated in *Mattoon*, we believe the filing of serial modification applications may constitute an abuse of process.²¹ We previously entered into a consent decree with a party that acknowledged that its filing strategy was an abuse of process and agreed to forfeit several authorizations.²²

Serial applications implicate the *Ashbacker* rights of other applicants or prospective applicants.²³ In that decision, the United States Supreme Court held that, where two parties' applications are mutually exclusive, the grant of one application without first considering the second application violated the due process rights of the second.²⁴ *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,"²⁵ and *Ashbacker* rights "inhere in potential applicants whose right to file a timely competing application is frustrated by a Commission freeze order."²⁶

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.²⁷ The Commission may limit eligibility to file competing applications when such action promotes the public interest,²⁸ 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,²⁹ 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."³⁰ 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

²⁰ 47 U.S.C. § 308(a).

²¹ 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.").

²² *Broadcast Towers, Inc.*, Order and Consent Decree, 26 FCC Rcd 7681, 7686 (MB 2011). See also *Radio Power, Inc.*, Letter, 27 FCC Rcd 1465 (MB 2012) (issuing letter of inquiry to Radio Power, Inc., to determine whether licensee abused Commission processes by effectuating a major change in the facilities of Station W250BN by a succession of serial minor change applications).

²³ *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327 (1945) ("*Ashbacker*").

²⁴ See *Ashbacker*, 326 U.S. at 332-33.

²⁵ *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*.").

²⁶ *Bachow v. FCC*, 237 F.3d 683, 690 n. 7 (D.C. Cir. 2001).

²⁷ See *id.* at 689, discussing *Kessler v. FCC*, 326 F.2d 673 (D.C. Cir. 1963).

²⁸ See *Aeronautical Radio, Inc. v. FCC*, 928 F.2d 428, 431 (D.C. Cir. 1991).

²⁹ See *1998 Biennial Review*, 14 FCC Rcd at 5277 ¶ 7.

³⁰ *1998 Biennial Review*, 13 FCC Rcd at 14871-72 ¶ 49.

that the Commission would have a legitimate reason to limit competitive filing opportunities by treating the serial applications as minor changes. Accordingly, we believe that routinely approving serial modifications would violate “the essence of *Ashbacker*.”³¹

Perry’s interpretation of the *Mattoon* waiver standard could eviscerate potential applicants’ *Ashbacker* rights while also encouraging additional abuses of our licensing procedures. Accordingly, we reject the view that we should exclude modifications by former licensees under the first prong of the *Mattoon* waiver standard. Both the applicant’s conduct and the station history are relevant in evaluating *Mattoon* waiver requests.

Nevertheless, we recognize that parties seeking to acquire translator authorizations could have reasonably - if incorrectly - construed the *Mattoon* waiver standard as solely focused on an applicant’s filing history rather than all station modifications.³² Accordingly, we believe that it would be unduly harsh and unfair for the Commission in acting on Perry’s waiver request to take into consideration modifications sought and/or undertaken by the Station’s prior licensee. We also find that we should accord this same treatment to other applicants that may have relied on a misreading of *Mattoon* to acquire translator authorizations. However, we must balance the relief we provide against the *Ashbacker* rights of potential applicants. Thus, only applicants that acquired translator authorizations following the release of *Mattoon* and prior to the release of this letter decision may exclude modifications of prior owners in showing compliance with the *Mattoon* waiver standard.

Mutual Exclusivity. Perry next maintains that waiver is justified because its current and proposed facilities remain mutually exclusive to one another.³³ 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 Perry 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.³⁴

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.

³¹ *Committee for Effective Cellular Rules*, 53 F.3d at 1321.

³² See, e.g., *Mattoon*, 26 FCC Rcd at 12686, 12688 (“we find that grant of [applicant’s] waiver request is in the public interest given . . . that [applicant] does not have a history of filing serial minor modification applications” . . . “Based on the record before us, [applicant] does not have a history of filing serial modification applications. . .”).

³³ Waiver Request at 2. See also Application at Exhibit 13.

³⁴ *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).

Concerns Raised in the LPFM Third Further Notice and Fourth Report and Order. As Perry notes, its proposed move to Oklahoma City would not foreclose future licensing opportunities in the LPFM service, and we 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.³⁵ Oklahoma City was subsequently identified in the *Fourth Report and Order* as a “Spectrum Available” market and not subject to such a restriction.³⁶ Thus, we find that Perry’s proposal does not implicate the concerns raised about LPFM spectrum availability in the *Third Further Notice* or *Fourth Report and Order*.

Fill-in for AM Station. Perry proposes to change the transmitter site for Station K221FQ and rebroadcast primary Station KRMP(AM), Oklahoma City, Oklahoma, 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 station.³⁷ This deregulatory measure has brought enhanced local service to hundreds of communities and allowed these AM stations to compete more effectively in their local markets. In addition, the Commission recently took steps to expand this practice in the *Fourth Report and Order*.³⁸ Approving Perry’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 Perry’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 Perry Broadcasting Company, Inc. (File No. BPFT-20120217ABF) to relocate K221FQ’s transmitter from Edmond to Oklahoma City, Oklahoma, IS GRANTED.

Sincerely,

Peter H. Doyle
Chief, Audio Division
Media Bureau

³⁵ *Third Further Notice*, 26 FCC Rcd at 9998.

³⁶ *Fourth Report and Order* at Appendix B.

³⁷ *See Amendment of Service and Eligibility Rules for FM Broadcast Translator Stations*, Report and Order, 24 FCC Rcd 9642 (2009).

³⁸ *Fourth Report and Order*, ¶¶ 66-70.