



Federal Communications Commission
Washington, D.C. 20554

May 17, 2013

DA 13-1132

In Reply Refer to:

1800B3-SS

Released: May 17, 2013

Mr. Gerald R. Proctor
137 Magnolia Bend Drive
Livingston, TX 77351

**In re: NEW FM Translator Station,
Willis, TX**
Facility ID No. 150776
File No. BNPFT-20030317AGP

**NEW FM Translator Station,
Cleveland, TX**
Facility ID No. 150748
File No. BNPFT-20030317AGA

Petitions for Reconsideration

Dear Mr. Proctor:

This letter concerns the March 17, 2003, applications (“Willis Application” and “Cleveland Application,” respectively) filed by Gerald R. Proctor (“Proctor”) for construction permits for new FM translator stations at Willis and Cleveland, Texas. The staff dismissed the Willis and Cleveland Applications on February 15, 2013.¹ In response, Proctor filed two March 11, 2013, Petitions for Reconsideration (collectively, the “Petitions”), seeking reinstatement of the Willis and Cleveland Applications. For the reasons set forth below, we deny the Petitions.

Background. The Willis and Cleveland Applications were filed in the March 2003 FM non-reserved band translator (Auction 83) filing window.² Both are in the “Appendix A” market of Houston, Texas, as specified in the *Fourth Report and Order*,³ in which the Commission adopted market-specific FM translator application processing policies designed to effectuate the Local Community Radio Act.⁴ In the *Fifth Order on Reconsideration*, the Commission decided that it would allow Auction 83 applicants to

¹ See *Media Bureau Dismisses FM Translator Form 349 “Tech Box” Proposals with Defective Caps Showings*, Public Notice, 28 FCC Rcd 1268 (rel. Feb. 15, 2013).

² See *FM Translator Auction Filing Window and Application Freeze*, Public Notice, 18 FCC Rcd 1565 (MB/WTB 2003). The filing window was subsequently extended to March 17, 2003. *FM Translator Auction Filing Window and Application Freeze Extended to March 17, 2003*, Public Notice, 18 FCC Rcd 3275 (MB/WTB 2003).

³ *Creation of a Low Power Radio Service and Amendment of Service and Eligibility Rules for FM Broadcast Translator Stations*, Fourth Report and Order and Third Order on Reconsideration, 27 FCC Rcd 3364 (2012) (“*Fourth Report and Order*”).

⁴ Pub. L. No. 111-371, 124 Stat. 4072 (2011).

prosecute a maximum of three applications in an “Appendix A” market, provided that: (1) the protected (60 dBμ) contour (calculated in accordance with Section 74.1204(b) of the Commission’s Rules (the “Rules”) of a proposed translator station did not overlap the protected contour of any other translator application filed by that applicant in Auction 83 or any translator authorization held by that applicant as of December 4, 2012; and (2) the translator application did not preclude grant of a future low power FM (“LPFM”) application in the “grid” for that market.⁵

On December 21, 2012, the Media Bureau (“Bureau”) issued a Public Notice⁶ that, *inter alia*, required applicants in “Appendix A” markets to submit certain “cap showings” as described above during a window opened for these filings. In response, on January 11, 2013, Proctor requested that the Willis and Cleveland Applications, as well as seven other applications he filed,⁷ be processed, but he did not submit the requisite cap showing for the Willis and Cleveland Applications. Rather, Proctor stated that “Commission Rules and Regulations have changed and evolved to the point where understanding those changes and . . . instructions present a real challenge. What was once relatively simple has now become very complex and – to me – extremely confusing.”⁸ On February 15, 2013, the staff dismissed the Willis and Cleveland Applications for failure to file cap compliance showing amendments. On March 11, 2013, Proctor filed the Petition.

On reconsideration, Proctor contends that he failed to timely file amendments showing that each application would not preclude grant of a future LPFM application in the grid for the Houston market due to his “confusion.”⁹ Proctor argues that because of this confusion, he should now be allowed to submit a Preclusion Study indicating that neither the Willis nor Cleveland Applications would preclude LPFM licensing opportunities within the Houston grid. Proctor claims that reinstatement of the Willis and Cleveland Applications will serve the public interest and that no party will be prejudiced by their reinstatement.¹⁰

Discussion. The Commission will consider a petition for reconsideration only when the petitioner shows either a material error in the Commission's original order, or raises additional facts, not known or existing at the time of the petitioner's last opportunity to present such matters.¹¹ Proctor has not met this burden.

⁵ See *Creation of a Low Power Radio Service and Amendment of Service and Eligibility Rules for FM Broadcast Translator Stations*, Fifth Order on Reconsideration and Sixth Report and Order, 27 FCC Rcd 15402, 15410, 15421-22 (2012) (“*Fifth Order on Reconsideration*”).

⁶ See *Media Bureau Announces January 10 - January 25, 2013 Filing Window for Auction 83 FM Translator Application Selections and Caps Showings*, Public Notice, 27 FCC Rcd 15961 (MB 2012) (“*Selection PN*”).

⁷ Proctor also selected the following FM translator applications: File Nos. BNPFT-20030317AFN; BNPFT-20030317AFB; BNPFT-20030317AEO; BNPFT-20030314ARY; BNPFT-20030314AQX, all at Huntsville, Texas; BNPFT-20030314APU, Livingston, Texas; and BNPFT-20030314AOL, Buna, Texas.

⁸ See *Letter to Marlene H. Dortch, Secretary, Federal Communications Commission*, submitted January 11, 2013 (“*Proctor Letter*”).

⁹ Petition at 2.

¹⁰ Petition at 3.

¹¹ See 47 C.F.R. § 1.106(c),(d). See also *WWIZ, Inc.*, Memorandum Opinion and Order, 37 FCC 685, 686 (1964), *aff'd sub nom. Lorain Journal Co. v. FCC*, 351 F.2d 824 (D.C. Cir. 1965), *cert. denied*, 387 U.S. 967 (1966).

Without specifically stating so, Proctor requests a waiver of the Commission requirement that FM translator applications in “Appendix A” markets file their cap showings by January 25, 2013. In this regard, the Bureau clearly stated that “[Preclusion] Caps Showings may not be submitted, amended, corrected or resubmitted for further consideration after the Caps Deadline [of January 25, 2013]. Neither a Selection List nor a Caps Showing will be treated as a matter subject to amendment, correction or completion pursuant to 47 C.F.R. § 73.3522(a). . . .”¹² Section 1.3 of the Rules expressly provides that any provision of the Rules may be waived by the Commission in whole or in part, for good cause shown.¹³ An applicant seeking a waiver has the burden to plead with particularity the facts and circumstances that warrant such action.¹⁴ The Commission must give waiver requests “a hard look,” but an applicant for waiver “faces a high hurdle even at the starting gate”¹⁵ and must support its waiver request with a compelling showing.¹⁶ The Commission may exercise its discretion to waive a policy or rule where the particular facts make strict compliance inconsistent with the public interest.¹⁷ In addition, the Commission may take into account considerations of hardship, equity, or more effective implementation of overall policy on an individual basis.¹⁸ However, waiver of the Commission's policies or 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.¹⁹

The facts presented by Proctor do not meet this burden. Proctor states in the Petition and in the *Proctor Letter* that he missed the filing deadline due to his “confusion” as to what was required by the Commission.²⁰ Such an error is the applicant’s responsibility, and lack of knowledge of or failure to understand the Commission’s rules and policies does not excuse failure to meet a filing deadline.²¹ Indeed, the *Selection PN* contained contact points of Bureau representatives for applicants requiring additional guidance.²² The Bureau has routinely stated that applicants are charged with knowledge of the

¹² *Selection PN*, 27 FCC Rcd at 15964.

¹³ 47 C.F.R. § 1.3.

¹⁴ See *Columbia Communications Corp. v. FCC*, 832 F.2d 189, 192 (D.C. Cir. 1987).

¹⁵ 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).

¹⁶ *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)).

¹⁷ *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (“*Northeast Cellular*”).

¹⁸ *WAIT Radio*, 418 F.2d at 1159; *Northeast Cellular*, 897 F.2d at 1166.

¹⁹ *NetworkIP, LLC v. FCC*, 548 F.3d 116, 125-128 (D.C. Cir. 2008) (“*NetworkIP*”); *Northeast Cellular*, 897 F.2d at 1166.

²⁰ Petition at 2; *Proctor Letter* at 1.

²¹ See *Alamo Navajo School Board, Inc.*, Forfeiture Order, 25 FCC Rcd 17057, 17059 (MB 2010) (rejecting argument that late-filing should be excused because licensee’s staff was “simply daunted and confused by the arcane requirements of the [Commission’s] electronic filing system”); *Community-First Broadcasters, Inc.*, Forfeiture Order, 23 FCC Rcd 10923, 10923-24 (MB 2008) (same, for licensee who was “flummoxed” by the Commission's electronic filing procedures).

²² *Selection PN*, 27 FCC Rcd at 15965.

processing rules, and the burden of providing information and demonstrating qualifications by the applicable deadlines falls upon the applicants.²³

Additionally, Proctor has not demonstrated that waiver of the cap showing deadline in this case would not undercut or frustrate the processing efficiencies which the filing deadline was designed to promote.²⁴ The *Selection PN* provided detailed information about filing requirements. In addition, Proctor does not dispute the fact that he received adequate notice regarding the filing deadline for his “Appendix A” filings. The Commission’s rules are best served by applying deadlines in a fair and consistent manner. Permitting Proctor to file his preclusion showings after the well-published deadline – based solely on his “confusion” and failure to become familiar with the Commission’s revised FM translator processing policies -- would be both patently unfair to the many applicants who timely filed such showings and inimical to the efficient processing of the remaining Auction 83 applications.²⁵

Conclusion/Actions. We find that Proctor has not set forth an error of fact or law, or presented new facts or changed circumstances which raise substantial or material questions of fact that otherwise warrant reconsideration of the staff’s action. Accordingly, for the reasons set forth above, IT IS ORDERED, that the two March 11, 2013, Petitions for Reconsideration filed by Gerald R. Proctor ARE DENIED.

Sincerely,

Peter H. Doyle
Chief, Audio Division
Media Bureau

²³ See *L.T. Simes II and Raymond Simes*, Letter, 21 FCC Rcd 1421, 1422 (MB 2006) (burden of providing information and demonstrating qualifications by the applicable deadline falls upon the applicant).

²⁴ See *Glorious Communications Channel Broadcasting, LLC*, Letter, 20 FCC Rcd 11887, 11888 (MB 2005) (waiver request denied where applicant, aware of filing deadline but “distracted by personal problems,” failed to make submission).

²⁵ See *Gregg P. Skall, Esq., Womble, Carlyle, Sandridge & Rice*, Letter, 20 FCC Rcd 11889, 11890 (MB/WTB 2005) (“The Commission’s auction rules are best served by applying deadlines in a fair and consistent manner. By having an announced procedure which applies uniformly, we created a predictable and fair procedure for all applicants in [the] Auction . . .”).