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Washington, D.C. 20554

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**DA 13-1506**

*In Reply Refer to:*

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David Oxenford, Esq.  
Wilkinson Barker Knauer LLP  
2300 N Street NW  
Suite 700  
Washington, DC 20037

In re: New FM Translator Station at  
Los Angeles, CA  
Educational Media Foundation  
Facility ID No. 139827  
File No. BNPFT-20030314ACH

Dear Counsel:

We have before us is the above-captioned application filed by Educational Media Foundation (“EMF”) for a new FM translator station at Los Angeles, California (“Application”). For the reasons discussed below, we will dismiss the Application.

**Background.** During the 2003 Auction No. 83 FM Translator filing window,<sup>1</sup> EMF filed more than 800 FM translator applications, including the Application and an application proposing a new FM Translator Station at Quartz Hill, California.<sup>2</sup> Both are in the “Appendix A” market of Los Angeles, California, as specified in the *Fourth Report and Order*,<sup>3</sup> in which the Commission adopted market-specific FM translator application processing policies designed to effectuate the Local Community Radio Act.<sup>4</sup> In the *Fifth Order on Reconsideration*, the Commission decided that it would allow Auction 83 applicants to prosecute a maximum of three applications in an “Appendix A” market, provided that: (1) the protected (60 dB $\mu$ ) 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

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<sup>1</sup> The filing window was open from March 10, 2003, through March 17, 2003. *See FM Translator Auction Filing Window and Application Freeze*, Public Notice, 18 FCC Rcd 1565 (MB/WTB 2003). *See also FM Translator Auction Filing Window and Application Freeze Extended to March 17, 2003*, Public Notice, 18 FCC Rcd 3275 (MB/WTB 2003).

<sup>2</sup> File No. BNPFT- 20030317AZD (“Quartz Hill Application”).

<sup>3</sup> *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*”).

<sup>4</sup> Pub. L. No. 111-371, 124 Stat. 4072 (2011).

power FM (“LPFM”) application in the “grid” for that market.<sup>5</sup>

To satisfy this latter condition, applicants proposing to prosecute more than one application in an Appendix A market were required to submit as part of its “Caps Showing” an LPFM preclusion study demonstrating that grant of the proposed translator would not preclude approval of a future LPFM application.<sup>6</sup> The Commission stated that it was appropriate “to impose these conditions on *all* applications if a party chooses to prosecute more than one application in an Appendix A market”<sup>7</sup> and that “[t]he relaxed limit of three applications per market will only apply to an applicant that shows that its applications meet the [above] conditions . . . .”<sup>8</sup> It also stated that, although the *Fourth Report and Order* described certain translator amendment opportunities in connection with the market-based processing policy, “*the application caps we describe here will be applied before any such amendment opportunity is available.*”<sup>9</sup> Moreover, the Bureau specifically indicated in the *Selection PN* that “[n]o amendments to Applications will be permitted in connection with these Caps Showings nor may any Caps Showing assume a future amendment to the Application.”<sup>10</sup>

On January 17, 2013,<sup>11</sup> EMF selected both the Application and the Quartz Hill Application for further processing in the Los Angeles Appendix A market. Because EMF chose to pursue more than one application in the Los Angeles market it was required to submit additional per-market showings. Regarding the 60 dB $\mu$  contour, EMF states that the Application did not overlap with the 60 dB $\mu$  of any EMF owned translator.<sup>12</sup> As for the non-preclusion of LPFM opportunities, EMF concedes that the Application does not satisfy this requirement because it does not meet the minimum spacing set forth at Section 73.807<sup>13</sup> of the Rules with respect to certain points within the grid where LPFM stations could be authorized.<sup>14</sup> Citing the *Fourth Report and Order’s* allowance for an amendment to eliminate preclusive impacts on LPFM opportunities under specified circumstances, EMF seeks to amend the Application.<sup>15</sup>

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<sup>5</sup> 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*”).

<sup>6</sup> 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*”). Under the “Grid” Test in spectrum limited Appendix A markets, “studies must protect all authorizations and applications on co-and first adjacent channels, *excluding* all pending Auction 83 Applications. The study should ignore second-adjacent and intermediate-frequency protection requirements but otherwise should apply all other LPFM spacing requirements. An application fails this test if it precludes any identified channel/point licensing opportunity within the grid for a future LPFM station.” *Id.*, at 15967 (emphasis in original, footnotes omitted).

<sup>7</sup> *Fifth Order on Reconsideration*, 27 FCC Rcd at 15422-15423 ¶¶ 59-60 (emphasis added).

<sup>8</sup> *Id.*, 27 FCC Rcd at 15419 ¶ 54.

<sup>9</sup> *Id.*, 27 FCC Rcd at 15423 ¶ 67 (emphasis added).

<sup>10</sup> *Selection PN*, 27 FCC Rcd at 15961.

<sup>11</sup> On December 21, 2012, the Media Bureau issued the *Selection PN* directing applicants affected by the application caps to submit a list, from January 10, 2013, through January 25, 2013, identifying the applications selected for further processing. See *id.*

<sup>12</sup> See *EMF Auction 83 Translator Application Selection and Cap Showings*, (January 12, 2013) (“*EMF Cap Showings*”).

<sup>13</sup> 47 C.F.R. § 73.807. Pursuant to the minimum distance separations chart set forth at 47 C.F.R. § 73.807(a)(1) a minimum distance of 24 kilometers is required here.

<sup>14</sup> See *EMF Cap Showings*. EMF refers to these locations as “sacred points.” *Id.* at 4.

<sup>15</sup> *Id.* at 4, citing *Fourth Report and Order*, 27 FCC Rcd at 3391 ¶ 57.

EMF opines that “a reasonably sized area . . . exists where a theoretical move could be made . . . to satisfy the required separation [requirements] . . . .”<sup>16</sup>

**Discussion.** We will treat EMF’s request to amend the Application as an implied request for waiver of the Cap Showing requirement. 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.<sup>17</sup> An applicant seeking a waiver has the burden to plead with particularity the facts and circumstances that warrant such action.<sup>18</sup> The Commission must give waiver requests “a hard look,” but an applicant for waiver “faces a high hurdle even at the starting gate”<sup>19</sup> and must support its waiver request with a compelling showing.<sup>20</sup> The Commission may exercise its discretion to waive a policy or rule where the particular facts make strict compliance inconsistent with the public interest.<sup>21</sup> In addition, the Commission may take into account considerations of hardship, equity, or more effective implementation of overall policy on an individual basis.<sup>22</sup> 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.<sup>23</sup>

The facts presented here do not meet this burden. It is true that in the *Fourth Report and Order*, the Commission provided that applicants with proposals in “spectrum limited” markets “would be given one opportunity to modify their proposals to eliminate all preclusive impacts on protected LPFM channel/point combinations.”<sup>24</sup> However, this amendment opportunity was limited in the *Fifth Order on Reconsideration*, when the Commission expanded the per-market cap from one to three applications in an Appendix A market and in the *Selection PN*.<sup>25</sup> EMF does not argue that any “special circumstances” exist that would exempt it from complying with the Caps Showing requirement, nor are any apparent.

Additionally, EMF has not demonstrated that waiver of the Cap Showing requirement in this case would not undercut or frustrate the processing efficiencies which the showing were designed to promote. When the Commission increased the per-market cap from one to a maximum of three applications in an Appendix A market, it required the applicant to demonstrate that the proposed translator station will not preclude approval of a future LPFM application in the grid for that market. These requirements ensure that translator licensing procedures protect future LPFM licensing opportunities and facilitate the prompt licensing of new translator stations.<sup>26</sup> Given the extraordinarily high number of pending applications, the Commission opined that “it was administratively infeasible to conduct a case-by-case assessment of

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<sup>16</sup> *Id.*

<sup>17</sup> 47 C.F.R. § 1.3.

<sup>18</sup> See *Columbia Communications Corp v. FCC*, 832 F.2d 189, 192 (D.C. Cir. 1987).

<sup>19</sup> See *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. 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).

<sup>20</sup> *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)).

<sup>21</sup> *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (“*Northeast Cellular*”).

<sup>22</sup> *WAIT Radio*, 418 F.2d at 1159, *Northeast Cellular*, 897 F.2d at 1166.

<sup>23</sup> *NetworkIP, LLC v. FCC*, 548 F.3d 116, 125-128 (D.C. Cir. 2008) ; *Northeast Cellular*, 897 F.2d at 1166.

<sup>24</sup> *Fourth Report and Order*, 27 FCC Rcd at 3391 ¶ 57.

<sup>25</sup> See *Fifth Order on Reconsideration*, 27 FCC Rcd at 15423 ¶ 67; *Selection PN*, 27 FCC Rcd at 15961.

<sup>26</sup> See *Fourth Report and Order*, 27 FCC Rcd at 3373-74 ¶ 19. See also *Fifth Order on Reconsideration*, 27 FCC Rcd at 15420, 15423 ¶¶ 55, 66-7.

these applications to determine whether they could satisfy our rule limiting the grant of additional translator authorizations . . . .”<sup>27</sup> These considerations apply here. Permitting EMF to amend its application to comply with the LPFM protection standards after the deadline would be both patently unfair to the hundreds of applicants who complied with Cap Showings requirements and inimical to an efficient and expeditious FM translator licensing process.<sup>28</sup>

Accordingly, we cannot find that special circumstances exist which warrant a deviation from our policy. Nor do we find that a waiver to allow EMF to amend its Application would serve the public interest.

**Conclusion/Actions.** Accordingly, IT IS ORDERED, that the application of Educational Media Foundation (File No. BNPFT-20030314ACH) IS HEREBY DISMISSED.

Sincerely,

Peter H. Doyle  
Chief, Audio Division  
Media Bureau

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<sup>27</sup> *Id* at 15406 ¶ 11. The Commission also specifically noted that applying the application caps prior to allowing amendment opportunities for spectrum-limited Appendix A market applications “will expedite our processing of the large volume of translator applications, which needs to be done before we can open an LPFM filing window.” *Id.* at 15423 ¶ 67.

<sup>28</sup> 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 . . .”).