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In re: **W218CR, Central City, Kentucky**
Facility ID No. 141101
File No. BPFT-20121116ALE

Dear Applicant:

We have before us the above-referenced application ("Application") for a minor change to FM translator station W218CR, Central City, Kentucky (the "Station"), filed on November 16, 2012, by Way Media, Inc. ("Way"). The Application seeks to change the Station's frequency (output channel) from Channel 218 to Channel 279 and move its transmitter to a new site in Tell City, Indiana, at which the Station's 60 dBμ contour would not overlap with the 60 dBμ contour of the existing facilities. From the proposed facility, the Station would rebroadcast the signal of Station WTCJ(AM), licensed to Hancock Communications, Inc. ("Hancock"). Also on November 16, 2012, Way and Hancock (the "Parties") filed an application for consent to assign the Station from Way to Hancock.[1] The Parties state that consummation of the assignment is contractually contingent on grant of the Application.[2]

Background. Because the non-adjacent channel and transmitter site changes proposed in the Application each constitutes a major change under Section 74.1233(a)(1) of the Rules,[3] the Parties request a waiver of Section 74.1233(a)(1) to permit the proposed changes using a minor change application ("Waiver Request").[4] The Waiver Request is accompanied by a document from Hancock entitled "AM Revitalization Public Interest Reasons in Favor of WTCJ(AM) Waiver Grant" ("Hancock Statement")[5]

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[1] *See* File No. BALFT-20121116AKR. The assignment application was granted on January 8, 2013. *See Broadcast Actions*, Public Notice, Report No. 47903 (Jan. 11, 2013).

[2] *See* Application, Exhibit 3. The Parties last requested a 90-day extension of the time to consummate on May 14, 2014.

[3] 47 C.F.R. § 74.1233(a)(1) ("For FM translator stations, a major change is any change in frequency (output channel) except changes to first, second or third adjacent channels, or intermediate frequency channels, and 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") ("Section 74.1233(a)(1)").

[4] *See* Application, Exhibit 3, "Waiver Request."

[5] *See* Application, Exhibit 3, "Public Interest Showing."

and letters of support from various third parties.[6] The Parties argue that waiver is warranted because Section 74.1233(a)(1) is a rule of "outdated public interest benefit" whose "procedural regulatory barriers" should give way when balanced against the public interest benefit of AM revitalization.[7] A waiver rather than a rulemaking is appropriate, the Parties claim, because it "does not behoove the FCC to use rule making resources in tweaks to its existing rules if doing so would only benefit a limited class of broadcasters."[8]

The Parties claim that the Waiver Request includes "practical, workable, limitation[s]," namely: (1) the Station's existing transmitter site is within the 0.025 mV/m interference contour of the primary AM station; and (2) the move is not to an LPFM spectrum-limited market.[9] The Parties contend that "[because] the requested move under the waiver is limited to FM translators within the interference contour of the AM station, prospective applicants will not be unfairly prejudiced as the parameters of this waiver will enable other FM translator licensees in accord with *Ashbacker* to predict whether other area stations have the potential to seek facility changes that might conflict with the proposed translator modification application."[10] In its Memorandum, NAB argues that the November 21, 2012, public notice of the acceptance for filing of the Application[11] provided adequate notice to potentially competing applicants of the opportunity to file: "[P]rospective applicants knew that, thanks to Section 309(b), they could assure timely filing—and, thus, comparative consideration—if they filed by December 21, 2012."[12] Because no such competing applications were filed, NAB concludes, *Ashbacker* was satisfied.[13]

Discussion. The Commission's Rules may be waived only for good cause shown.[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] Waiver is appropriate only if both (1) special circumstances warrant a deviation from the general rule, and (2) such deviation better serves the public interest.[17] The Parties have failed to meet this burden.

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[6] The third party letters are from various AM broadcasters, the mayor of Tell City, Minority Media and Telecom Council, SESAC (a performing rights organization), iBiquity Digital Corporation, and the National Association of Broadcasters ("NAB Memorandum"). Application, Exhibit 3.

[7] Waiver Request at 2.

[8] Hancock Statement at 2.

[9] Waiver Request at 1.

[10] Waiver Request at 4 (citing *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327 (1945) (holding that where two *bona fide* applications are mutually exclusive, the grant of one without considering the other violates the statutory right of the second applicant to comparative consideration)).

[11] *See Broadcast Applications*, Report No. 27869 (Nov. 21, 2012) ("Public Notice").

[12] NAB Memorandum at 5.

[13] *Id*.

[14] 47 C.F.R. § 1.3.

[15] *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969) (subsequent history omitted).

[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] *NetworkIP, LLC v. FCC*, 548 F.3d 116, 125-128 (D.C. Cir. 2008); *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990).

The parties fail to identify any special circumstances in this case that would warrant a deviation from the general rule.[18] To the contrary, the Waiver Request and accompanying letters make clear that the waiver, if granted, would be so widely applicable as to be a general boon to the AM industry.[19] The particular limitations noted by the parties do not create special circumstances such as would justify a waiver; rather, they appear to be the types of parameters that would typically define a rule of general applicability. We thus agree with the Parties that the Waiver Request is best described as a "regulatory change."[20] As discussed below, such a change is more appropriately considered in the ongoing AM revitalization rulemaking proceeding.

In brief, the Waiver Request asks that we enlarge the geographic area in which an FM translator is permitted to relocate in a single step. Specifically, the Parties request that we expand the scope of our 2011 *Mattoon* decision to include moves that originate anywhere within an AM station's 0.025 mV/m interference contour.[21] In *Mattoon*, the requested move did not qualify as a minor change under Section 74.1233(a)(1), which requires that the 60 dBμ contours of the existing and proposed FM translator facilities overlap. However, we found that waiver of Section 74.1233(a)(1) was in the public interest because: (1) the applicant did not have a history of filing serial minor modification applications; (2) the proposed site was mutually exclusive with the licensed facility; (3) the proposed move was not in an LPFM spectrum-limited market; and (4) the translator would rebroadcast an AM station.[22] Although the Parties do not discuss *Mattoon* by name, the only way in which the Waiver Request appears to depart from the *Mattoon* criteria is that the Parties' proposed site is not mutually exclusive with the existing licensed facility. Rather, the proposed and existing sites are both within the 0.025 mV/m interference contour of the proposed primary AM station—a much more expansive standard.

We decline to expand the second *Mattoon* criterion as proposed by the Parties. First, the Waiver Request presents *Ashbacker*-related procedural concerns. In *Ashbacker*, the Supreme Court held that where two applications are mutually exclusive, the grant of one without considering the other violates the statutory right of the second applicant to comparative consideration.[23] We have held that the doctrine does apply where, as here, prospective mutually exclusive applications would have been timely but for the window filing restriction on FM translator major changes.[24] It is well established that the Commission may promulgate procedural rules limiting the eligibility of parties to file mutually exclusive

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[18] *See, e.g., Meredith/New Heritage Strategic Partners, L.P.*, 9 FCC Rcd 6841, 6842 (1994).

[19] For example, Emmis Communications states that grant of the Waiver Request would "provide an immediate benefit to a significant number of AM stations by increasing the number of translators available to them." Application, Exhibit 3, "Letter Supporting Tell City Waiver from Emmis Communications." Likewise, WESR AM observes that "[t]his action would have an immediate, substantive effect upon the vitality of many AM stations." Application, Exhibit 3, "Letters Supporting Tell City Waiver from Similarly-Situated AM Broadcasters."

[20] Hancock Statement at 1.

[21] *See John F. Garziglia*, Letter, 26 FCC Rcd 12685 (MB 2011) ("*Mattoon*").

[22] *Mattoon*, 26 FCC Rcd at 12686.

[23] *Ashbacker*, 326 U.S. at 332-33.

[24] *Mattoon*, 26 FCC Rcd at 12688; s*ee also Bachow v. FCC*, 237 F.3d 683, 689-90 (D.C. Cir. 2001) (holding that *Ashbacker* rights inhere in potential applicants whose right to file a timely competing application is frustrated by a Commission freeze order).

applications.[25] However, applicants subject to such procedures must be treated equally and fairly: "The *Ashbacker* decision . . . held that the Commission must use the same set of procedures to process the applications of all similarly situated persons who come before it seeking the same license."[26] "The ability to compete on an equal basis . . . is the essence of *Ashbacker*."[27]

In this case, potentially competing applicants were not in a position to compete on an equal basis with the Application. First, the "set of procedures" suggested by the Parties would apply in the first instance to the Application alone—not to potentially competing applicants, who would not have either notice or the opportunity of a filing window. Neither the filing of the Application nor the Public Notice constitutes such notice, for several reasons. First, pursuant to the "application purpose" selection chosen by Way, the Public Notice listed the Application as a "minor change" application, without any mention of the Waiver Request. Therefore, even a vigilant competitor would not be alerted by the Public Notice alone to the possibility of the Parties' proposed long-distance, one-step move.[28] Second, and more importantly, the Parties' proposal was not adopted or approved by the Commission. In the absence of *Commission* action establishing a new procedural rule, other licensees are restricted by—and entitled to rely upon—the existing rules, including the geographic limitations on minor modifications set forth in Section 74.1233(a)(1).[29] There is no merit to NAB's argument that prospective applicants in this case could "assure timely filing—and, thus, comparative consideration" if they filed within 30 days of the Public Notice.[30] If the Application were treated as a minor change (as requested), Section 74.1233(d)(1) of the Rules mandates that it receive protection from subsequent, conflicting applications on a first-come, first-served basis.[31] Competing applications filed within 30 days of the Public Notice (or at any other time after the Application was filed) would not receive comparative consideration but would be placed in a queue pending action on the Application.[32] For these reasons, we find that grant of the Waiver Request

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[25] *See Ashbacker*, 326 U.S. at 333 n.9.

[26] *Maxcell Telecom Plus, Inc. v. FCC*, 815 F.2d 1551, 1555 (D.C. Cir. 1987); *see also e.g.*, *Processing of FM and TV Broadcast Applications,* Report and Order, 50 FR 19936-01, 19939 (1985) ("[T]he use of cut-off procedures has been acknowledged by the Court as a reasonable and necessary limitation on the statutory right to a comparative hearing. However, any regulations limiting the right to a hearing must give fair notice to the public of what is being cut-off. Therefore, although the Commission can be flexible in establishing "housekeeping" rules, applicants must be treated equally and fairly by giving them notice of the due dates for their applications.") (internal citations omitted).

[27] *Committee for Effective Cellular Rules v. FCC*, 53 F.3d 1309, 1321 (D.C. Cir. 1995).

[28] *See McElroy Electronics Corp. v. FCC*, 3 CR 484 (D.C. Cir. 1996) (finding that a vaguely-worded Commission public notice still provided notice that a 60-day cut-off period had begun, for *Ashbacker* purposes, because "a minimally diligent competitor would have recognized need to take action in response to the notice").

[29] *See generally Reuters Ltd. v. F.C.C.*, 781 F.2d 946, 950 (D.C. Cir. 1986) ("[I]t is elementary that an agency must adhere to its own rules and regulations.").

[30] NAB Memorandum at 5. The NAB Memorandum relies heavily on the 2001 *Bachow* decision, which is factually distinct from the matter before us in an important respect. At that time, public notice of the filing of the first application for a given license triggered a 60-day filing window for competing applications. *Id*. at 686. No such opportunity existed in this case.

[31] 47 C.F.R. § 74.1233(d)(1).

[32] *Id*. ("The rights of an applicant in a queue ripen only upon a final determination that the lead applicant is unacceptable and if the queue member is reached and found acceptable. The queue will remain behind the lead applicant until a construction permit is finally granted, at which time the queue dissolves").

would be inconsistent with the requirement of *Ashbacker* and its progeny to provide potentially competing applicants the opportunity to compete on an equal basis under procedures applicable to all similarly-situated applicants.

On this point, we emphasize that mutual exclusivity was the lynchpin of our *Ashbacker* analysis in *Mattoon*, in which we held that a mutually exclusive move would not, as a practical matter, preclude competing applications because "potential applicants already are precluded from requesting such a new allotment because of the mutual exclusivity with the existing one."[33] Without mutual exclusivity, "minor change treatment of [one-step] FM translator applications would abrogate the *Ashbacker* rights of potential competing applicants."[34] Thus the reasoning in *Mattoon* is consistent with our decision herein.

As a separate and independent ground for our decision, we believe that a waiver is not the proper forum to address AM revitalization public policy goals, given that the Commission has recently undertaken a comprehensive examination of this matter.[35] On October 29, 2013, the Commission adopted a notice of proposed rulemaking seeking comment on, *inter alia*, opening an FM translator filing window exclusively for AM licensees and permittees so that AM stations could acquire an FM translator without the need to relocate an existing translator station.[36] The Commission also asked "whether, between our relaxation of the limitation on FM translators that can be used to rebroadcast AM station signals, and the AM-only FM translator window proposed here, there will no longer be a need for so-called 'Mattoon Waivers.'"[37] Because the Commission has questioned the continued necessity of the *Mattoon* approach and has proposed an alternative means of providing AM licensees with FM translators, it would not be appropriate for the Bureau to prejudge the outcome of the AM revitalization proceeding by expanding the *Mattoon* policy in this individual licensing decision.[38] A rulemaking has the advantage of a full record covering a wide range of possible solutions, rather than being limited to the specific facts and circumstances presented in this case. In this respect, we reject the Parties' assertion that a rulemaking is not appropriate for a regulatory change that benefits only a "limited class of broadcasters." Many—if not most—regulations apply only to a limited class of broadcasters. Furthermore, as mentioned above, the Waiver Request and accompanying letters clearly indicate the potentially far-reaching effects of this waiver on the AM industry.[39] For this reason as well, we deny the Waiver Request.

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[33] *Mattoon*, 26 FCC Rcd at 12688.

[34] *Id*.

[35] *See Revitalization of the AM Radio Service*, Notice of Proposed Rulemaking, 28 FCC Rcd 15221 (2013) ("*AM Revitalization NPRM*").

[36] *AM Revitalization NPRM*, 28 FCC Rcd at 15225.

[37] *AM Revitalization NPRM*, 28 FCC Rcd at 15227 (citing *Amendment of Service and Eligibility Rules for FM Broadcast Translator Stations*, Report and Order, 27 FCC Rcd 3364, 3395-96 (2009) (allowing authorizations arising from pending FM translator applications to be used as cross-service translators)).

[38] Because we dismiss the Application based on the site change issue, we need not reach the Parties' additional request for waiver of the major change definition in Section 74.1233(a)(1) regarding non-adjacent channel changes. However, we note that the Parties do not allege any special circumstances that would warrant waiver, relying solely on the argument that non-adjacent channel changes are permitted in the full-power FM service. Waiver Request at 3-4; *see* 47 C.F.R. § 73.3573(a)(1)(ii); *Media Bureau Offers Examples to Clarify the Treatment of Applications and Rulemaking Petitions Proposing Community of License Changes, Channel Substitutions, and New FM Allotments*, Public Notice, 22 FCC Rcd 6852, 6853 (example 4) (MB 2007).

[39] *See supra*, note 20.

Conclusion/Actions. For the reasons stated above, IT IS ORDERED that the request for waiver of Section 74.1233(a)(1) IS DENIED and the Application filed by Way Media, Inc. on November 16, 2012, File No. BPFT-20121116ALE, IS DISMISSED.

Sincerely,

Peter H. Doyle
Chief, Audio Division
Media Bureau