



**Federal Communications Commission
Washington, D.C. 20554**

October 23, 2014

DA 14-1527
In Reply Refer to:
1800B3-ATS
Released: October 23, 2014

Mr. Leo Ashcraft
Boys & Girls Club of Geneva, Inc.
P.O. Box 160
Geneva, NY 14456

In re: Boys & Girls Club of Geneva, Inc.
New LPFM, Geneva, New York
Facility ID No. 191834
File No. BNPL-20131104AUS

Petition for Reconsideration

Dear Mr. Ashcraft:

We have before us the Petition for Reconsideration (“Petition”) filed by Boys & Girls Club of Geneva, Inc. (“Petitioner”), seeking reconsideration of the Media Bureau (“Bureau”) letter dismissing its application (“Application”) for a new LPFM station at Geneva, New York.¹ For the reasons set forth below, we deny the Petition.

Background. Petitioner filed the Application during the October 2013 LPFM filing window, proposing to serve Geneva, New York, on Channel 240. Petitioner certified in the Application that its proposal complied with “all pertinent spacing requirements of Section 73.807” and did not request a waiver of that rule.² The Bureau dismissed the Application on January 31, 2014, because it failed to comply with the minimum spacing requirements of Section 73.807(c) of the Commission’s Rules (“Rules”).³

Petitioner filed the Petition on February 26, 2014, seeking reinstatement of the Application and a waiver of Section 73.807(c). Petitioner acknowledges that the Application is short-spaced to W241AW, but argues that because W241AW uses a directional antenna, “there is no contour overlap between the proposed LPFM station’s interference contour and the 60dBu service contour of W241AW.”⁴ Petitioner suggests that Section 3 of the Local Community Radio Act (“LCRA”)⁵ distinguishes translator stations from full-service FM stations, and thus the Commission “is not statutorily prevented from waiving distance separation requirements in respect to FM translator stations.”⁶

¹ See *Boys & Girls Club of Geneva Inc.*, Letter, Ref 1800B3 (MB Jan. 31, 2014) (“*Dismissal Letter*”). See also *Broadcast Actions*, Public Notice, Report No. 48170 (MB Feb. 5, 2014).

² Application at Section VI, Question 8.

³ *Dismissal Letter* at 1. The *Dismissal Letter* explained that the Application failed to satisfy the minimum spacing requirements for first-adjacent FM translator station W241AW, Geneva, New York. See 47 C.F.R § 73.807(c). The *Dismissal Letter* further states that the Application was dismissed without opportunity to amend pursuant to Section 73.870(c) of the Rules. See 47 C.F.R 73.870(c) (“[A]pplications . . . the fail to meet the 73.807 minimum distance separations . . . will be dismissed without any opportunity to amend such applications.”).

⁴ Petition at 1-2.

⁵ See Pub. L. No. 111-371, 124 Stat. 4072 (2011).

⁶ Petition at 3.

Accordingly, Petitioner requests a waiver of Section 73.807(c) and reinstatement of the Application on the basis that: 1) the rule “is inequitable and unduly burdensome as it does not properly take into consideration situations where the translator facility is equipped with a directional antenna,” and 2) an “educational radio service for a youth organization would be in the public interest.”⁷ Finally, Petitioner states that the Bureau accepted for filing the LPFM application of North End Woodward Community Coalition – even though the application was short-spaced to a Canadian co-channel station – because the proposed LPFM station’s interference contour would not encroach onto Canadian territory; Petitioner argues that this case is analogous because its own proposed LPFM station would not encroach onto the service contour of W241AW.⁸

Discussion. The Commission's Rules may be waived only for good cause shown.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 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.¹²

We find that Petitioner has failed to meet the burden for grant of a waiver request. Petitioner states that a waiver is warranted because Section 73.807 “does not properly take into consideration situations where the translator facility is equipped with a directional antenna.”¹³ We do not find that this is a “special circumstance” because there are, as Petitioner suggests, many translators using directional antennas. Moreover, to the extent that Petitioner believes that the spacing requirements of Section 73.807(c) should be altered, the proper forum is a notice and comment rule-making proceeding.¹⁴

Furthermore, Petitioner certified in the Application that its proposal complied with the spacing requirements of Section 73.807 and did not request a waiver when it filed the Application.¹⁵ FCC Form 318 (Application for Construction Permit for a Low Power FM Broadcast Station) and the accompanying instructions are clear that an applicant that fails to meet the minimum spacing requirements of Section 73.807 for first-adjacent stations will be dismissed without the opportunity to amend pursuant to Section

⁷ *Id.*

⁸ Petition at 3 n.2, citing *North End Woodward Community Coalition*, File No. BNPL-20131113ABG (“*North End*”).

⁹ 47 C.F.R. § 1.3.

¹⁰ *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969) (subsequent history omitted).

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 *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).

¹³ Petition at 3.

¹⁴ See, e.g., *Community Television of Southern California v. Gottfried*, 459 U.S. 498, 511 (1984) (citation omitted) (“rulemaking is generally a ‘better, fairer and more effective’ method of implementing a new industry-wide policy”); *Sunburst Media L.P.*, Memorandum Opinion and Order, 17 FCC Rcd 1366 (2001) (stating “it has long been Commission practice to make decisions that alter fundamental components of broadly applicable regulatory schemes in the context of rulemaking proceedings, not adjudications”); *Great Empire Broadcasting, Inc.*, Memorandum Opinion and Order, 14 FCC Rcd 11145, 11148 (1999), citing *Capital Cities/ABC, Inc.*, Memorandum Opinion and Order, 11 FCC Rcd 5841, 5888 (1996) (it is generally inappropriate to address arguments for a change in rules “where third parties, including those with substantial stakes in the outcome, have had no opportunity to participate, and in which we, as a result, have not had the benefit of a full and well-counseled record”).

¹⁵ Application at Section VI, Question 8.

73.870(c).¹⁶ The Application did not address the short-spacing to W241AW or request a waiver of either Section 73.807(c) or Section 73.870(c). The Commission will only entertain spacing waivers (and then, only for second-adjacent channel spacing violations) from LPFM applicants when those waiver requests are included in the Application as of the close of the LPFM filing window.¹⁷ Moreover, permitting applicants to file waiver requests following the dismissal of their applications would frustrate the processing efficiencies which Sections 73.807 and 73.870 were designed to promote and would be unfair to the many applicants who fully complied with all filing requirements.¹⁸ Accordingly, Petitioner fails to satisfy the public interest prong of the waiver standard as well as the special circumstances prong. As such, we do not need to consider the merits of Petitioner's argument that the LCRA allows the Commission requested waiver.

Finally, Petitioner's reliance on *North End* is misplaced. The staff action in that case occurred via Public Notice and did not include a written decision; such an unpublished grant has no precedential effect.¹⁹ Moreover, it is distinguishable from the case at hand.²⁰ We will thus deny the waiver request and deny the Petition.

Conclusion/Actions. Accordingly, for the reasons set forth above, IT IS ORDERED THAT the Petition for Reconsideration filed on February 26, 2014, by Boys & Girls Club of Geneva, Inc., IS DENIED.

Sincerely,

Peter H. Doyle
Chief, Audio Division
Media Bureau

cc: Michelle Bradley

¹⁶ FCC Form 318, Section VI, Question 8a (“Note: New station applications that fail to meet all of the co-channel and first-adjacent channel separation requirements set forth in 47 C.F.R. Section 73.807 will be returned and will not be provided an opportunity to file a curative amendment.”). *See also* 47 C.F.R. § 73.870(c) (application will be dismissed without opportunity to amend if it proposes a location that fails to comply with a Section 73.807 violation).

¹⁷ *See Clifford Brown Jazz Foundation*, Memorandum Opinion, FCC 14-162 (rel. Oct. 15, 2014) (affirming dismissal of LPFM application – without opportunity to amend – where application violated Section 73.807 with regard to a second-adjacent station and did not request a waiver at the time of filing).

¹⁸ *See Creation of a Low Power Radio Service*, Report and Order, 15 FCC Rcd 2205, 2257 (2000) (“In accordance with our window filing procedure for commercial broadcast applications, after the LPFM window closes, the staff initially will screen applications for the purpose of identifying those that are mutually exclusive and those that fail to protect existing broadcast stations in accordance with the standards adopted herein. Applications that fail to properly protect these existing stations will be dismissed without the applicant being afforded an opportunity to amend. This will increase the speed and efficiency with which LPFM applications can be processed by the staff.”).

¹⁹ *See 1998 Biennial Regulatory Review -- Streamlining of Mass Media Applications, Rules, and Process*, Report and Order, 13 FCC Rcd 23056, 23076 (1998) (“Reliance on a prior Commission action would be appropriate only where a decision disposing of the prior application plainly considered and found acceptable the pertinent contract term or rule interpretation.”), *on recon.*, Memorandum Opinion and Order, 14 FCC Rcd 17525 (1999).

²⁰ In *North End*, the Bureau accepted that application for filing upon approval from the Canadian government, which determined that protection of the Canadian co-channel station was not required because the interfering contour of the LPFM station would not cross the U.S.-Canada border. *See, e.g., Colonial Radio Group, Inc.*, Memorandum Opinion and Order, 29 FCC Rcd 9954 (2014) (affirming longstanding interpretation of treaty with Canada that certain rules are inapplicable where translator station's interfering contour did not cross U.S.-Canada border).