



Federal Communications Commission
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In Reply Refer To:
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**In re: Chesapeake-Portsmouth Broadcasting Corp.
New FM Translator, Chesapeake, Virginia**
File No. BNPFT-20180131AGW
Facility ID No. 202981

Request for Waiver; Petition for Expedited Review of Waiver and Request for Dismissal of Application

Dear Counsel:

We have before us a Request for Waiver, submitted by Chesapeake-Portsmouth Broadcasting Corp. (Chesapeake) in connection with its application filed in the FM Translator Auction 100 filing window.¹ Chesapeake seeks waiver of the filing eligibility requirements ordered by the Commission in the *AM Revitalization* proceeding.² Also before us is a Petition for Expedited Review of Waiver and

¹ As required by 47 CFR § 73.5002(b), Chesapeake submitted in the Auction 100 filing window a FCC Form 175, Application to Participate in an FCC Auction, concurrent with an FCC Form 349 Tech Box seeking to construct a new cross-service FM translator station to rebroadcast Chesapeake's station WCPK(AM), Chesapeake, Virginia (WCPK). 47 CFR § 73.5002(b); *see also Filing Instructions for Second Cross-Service FM Translator Auction Filing Window for AM Broadcasters (Auction 100) to Open January 25-31, 2018*, Public Notice, 32 FCC Rcd 10173 (MB/WTB 2017) (*Auction 100 Filing Instructions Public Notice*).

² *Revitalization of the AM Radio Service*, First Report and Order, Further Notice of Proposed Rule Making, and Notice of Inquiry, 30 FCC Rcd 12145, 12153, para. 17 and n.40 (2015) (*AM Revitalization First R&O*).

Request for Dismissal of Application (Petition), filed by MHR License LLC (MHR), seeking expedited review of Chesapeake’s waiver request and dismissal of Chesapeake’s short-form application. MHR also filed an application to participate in Auction 100.³ Based upon an engineering review, MHR’s and Chesapeake’s FM translator proposals were determined to be mutually exclusive with each other.⁴ For the reasons discussed below, we deny Chesapeake’s Request for Waiver, grant MHR’s Petition and dismiss Chesapeake’s application for a new cross-service FM translator.

Background. In the *AM Revitalization First R&O*, the Commission ordered the Media Bureau to provide four opportunities for AM licensees and permittees to acquire cross-service FM translators to rebroadcast their signals.⁵ These opportunities were proposed to “address the daunting technical and competitive challenges that AM broadcasters face, to provide efficient and expeditious assistance to such broadcasters and, thus, to promote a more robust and sustainable AM broadcast service.”⁶ The first two opportunities were modification windows during which an AM licensee or permittee seeking to rebroadcast on an FM translator could acquire and relocate one authorized non-reserved band FM translator station up to 250 miles, and specify any rule-compliant non-reserved band FM channel, as a minor modification application, notwithstanding contrary provisions of the Commission’s rules.⁷ The second two opportunities were auction filing windows, subsequently designated Auction 99 and Auction 100, during which an AM licensee or permittee could apply for a new cross-service FM translator station, which would be permanently linked to the AM primary station that it would rebroadcast. The Commission specified in the *AM Revitalization First R&O* that the first cross-service FM translator auction filing window was to be open to AM station applicants that “[did] not participate, i.e., file an application, in one of the modification windows.”⁸ The Commission went on to state in the same order that eligibility to file for a cross-service FM translator in the second filing window would be limited to “AM permittees and licensees that have not participated in any of the prior modification or auction windows.”⁹ In both new translator auction windows, applicants were cautioned that the Commission would not consider any application naming, as the translator’s primary station, any primary AM station specified in any other *AM Revitalization* modification window or translator auction window application.¹⁰

³ File No. BNPFT-20180130ADI.

⁴ *Settlement Period Announced for Cross-Service Service FM Translator Mutually Exclusive Applications for Auction 100*, Public Notice, DA 18-332 (MB/WTB Apr. 3, 2018); *Settlement Period Announced for Certain FM Translator Mutually Exclusive Applications*, Public Notice, DA 18-907, at 5 (MB Sept. 6, 2018).

⁵ *AM Revitalization First R&O*, 30 FCC Rcd at 12152-54, paras. 15-17.

⁶ *Revitalization of the AM Radio Service*, Notice of Proposed Rule Making, 28 FCC Rcd 15221, 15228, para. 16 (2013) (*AM Revitalization NPRM*).

⁷ *AM Revitalization First R&O*, 30 FCC Rcd at 12152, para. 15. The Commission waived 47 CFR § 74.1233(a)(1), which defines major and minor modifications of FM translator facilities.

⁸ *AM Revitalization First R&O*, 30 FCC Rcd at 12153, para. 17. The first translator window was designated as Auction 99, and the second was designated as Auction 100.

⁹ *Id.* at 12153, para. 17.

¹⁰ *See, e.g., Filing Instructions for Second Cross-Service FM Translator Auction Filing Window for AM Broadcasters (Auction 100) to be Open January 25 – January 31, 2018; Freeze on FM Translator and Low-Power FM Station Minor Change Applications and FM Booster Applications January 18 – January 31, 2018*, Public Notice, 32 FCC Rcd 10173, 10187, para. 48 (MB/WTB 2017) (*Auction 100 Filing Instructions Public Notice*) (“No consideration will be given to . . . any proposal designating an AM primary station that was designated as the primary station on any application filed in either of the 2016 modification windows or the first 2017 new cross-service FM translator filing window . . .”).

In January 2016, Delmarva Educational Association (Delmarva), an entity controlled by Chesapeake's sole owner, applied during the first modification window to relocate FM translator station W214BJ from Murfreesboro, North Carolina, to Chesapeake, Virginia, also changing the translator's frequency, re-designating it as W267BY (Chesapeake Translator).¹¹ Delmarva designated station WCPK as the AM primary station to be rebroadcast by the Chesapeake Translator.¹² The Commission granted the application and issued a construction permit to modify and relocate the Chesapeake Translator.¹³ However, on August 12, 2016, Delmarva, having opted not to modify and move the Chesapeake Translator, requested cancellation of the construction permit.¹⁴ Subsequently, in the second modification window, Delmarva filed a new application to modify and relocate the Chesapeake Translator, again proposing to move it from Murfreesboro, but this time proposing to relocate it to Newport News, Virginia, and specifying Chesapeake's station WTJZ, Newport News, Virginia, as the primary AM station to be rebroadcast.¹⁵

Chesapeake then filed its application in the Auction 100 filing window, specifying WCPK as the primary AM station to be rebroadcast by the proposed new cross-service FM translator station on Channel 265 at Chesapeake, Virginia. As noted above, any applicant whose AM station was listed as the primary station in an application filed in either of the two modification windows or the Auction 99 filing window was ineligible to file an application specifying the same AM station in the Auction 100 window.¹⁶ Chesapeake seeks waiver of this eligibility provision, arguing there is good cause for waiver because the previous construction permit for the Chesapeake Translator to rebroadcast WCPK was surrendered for cancellation.¹⁷ MHR filed the Petition on June 14, 2018, arguing that not only was Chesapeake unqualified to file an Auction 100 application, it does not qualify for waiver of the Auction 100 eligibility criteria because it did not lose its initial construction permit for the Chesapeake Translator for reasons beyond its control.¹⁸ MHR seeks a decision on the waiver before Auction 100 bidding commences.

Discussion. We deny Chesapeake's waiver request. The Commission must give waiver requests "a hard look," but an applicant for waiver "faces a high hurdle even at the starting gate,"¹⁹ and must support its waiver request with a compelling showing.²⁰ 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.²¹ We find that Chesapeake has not made the requisite showing.

¹¹ File No. BMPFT-20160129ASH.

¹² WCPK is a Class D AM station.

¹³ See *Broadcast Actions*, Public Notice, Report No. 48678 (MB Feb. 25, 2016).

¹⁴ The permit was canceled on August 12, 2016.

¹⁵ File No. BMPFT-20160902AAZ. WTJZ is a Class B AM station.

¹⁶ See *supra* note 9. See also *Auction 100 Filing Instructions Public Notice*, 32 FCC Rcd at 10175, para. 5.

¹⁷ See *Edward A. Schober, PE*, Letter Decision, 33 FCC Rcd 145, 146 (MB 2018) (stating that Commission would entertain waiver requests of the *AM Revitalization* window eligibility requirements).

¹⁸ Petition at 2-3.

¹⁹ *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969) (*WAIT Radio*) (subsequent history omitted).

²⁰ *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)).

²¹ *Network IP, LLC v. FCC*, 548 F.3d 116, 125-128 (D.C. Cir. 2008) (*NetworkIP*); *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990).

Although WCPK would ordinarily qualify for a cross-service translator under the *AM Revitalization* policies, in the first 2016 modification window WCPK had been designated in an application – and, in fact, a construction permit – as the AM station to be re-broadcast by such a translator. The Commission made clear that AM stations were allowed to participate in one and only one of the two modification or two auction windows,²² and other potential applicants were entitled to rely on this participation limitation when considering whether and when they would exercise their sole opportunity to apply for new or modified cross-service translator stations. While we need not consider MHR’s accusation that either Delmarva or Chesapeake was “gaming the system” by surrendering the Chesapeake Translator construction permit, the fact remains that the permit was awarded, and we cannot say whether MHR or other potential AM licensees might have modified their own participation in the process—by, for example, re-tailoring their engineering specifications or choosing another channel to avoid mutual exclusivity—had they known that Delmarva would be allowed to surrender its construction permit to try again in a later auction window to obtain a translator to re-broadcast WCPK. Chesapeake has not shown that the facts of its particular case make strict compliance with a rule inconsistent with the public interest and that the relief requested would not undermine the policy objective of the rule in question.²³

Here, the designation of WCPK on a second application violated the threshold eligibility requirement. The Commission made it clear that participation in the *AM Revitalization* modification and translator auction windows was to be strictly limited to one opportunity per AM station, given the “supply of translator authorizations, the palpable demand for FM translator licensees by other stakeholders, and the relief afforded by the modification windows.”²⁴ The limited and targeted relief afforded to AM broadcasters through this process does not contemplate accommodating early participants who decide, upon surveying the post-modification window filing landscape, to abandon their earlier applications in favor of a later auction window opportunity. Departing from the “one opportunity to participate” policy would be unfair not only to those who did not file another proposal in the second window but also to those who complied with the established requirements and filed only in the second window. Finally, Chesapeake discloses no hardships or other specific circumstances; it merely states that the construction permit was dismissed “at Delmarva’s request.”²⁵ We thus find nothing in the facts of this specific case that suggests special or unique circumstances, or that strict compliance with the “one opportunity to participate” policy announced by the Commission would be inconsistent with the public interest, especially given the potential detriment to other applicants, such as MHR, who have not yet participated in the *AM Revitalization* translator process. We therefore decline to exercise our discretion to grant the requested waiver.

²² *AM Revitalization First R&O*, 30 FCC Rcd at 12153, para. 17; *Auction 100 Filing Instructions Public Notice*, 32 FCC Rcd at 10175, para. 5.

²³ *WAIT Radio*, 418 F.2d at 1157; *NetworkIP*, 548 F.3d at 116.

²⁴ *AM Revitalization First R&O*, 30 FCC Rcd at 12153 n.40.

²⁵ Petition at 1.

Conclusion. For the foregoing reasons, the Request for Waiver filed by Chesapeake-Portsmouth Broadcasting Corp. with its Auction 100 application IS DENIED. Chesapeake's FCC Form 349 application for a new FM translator station at Chesapeake, Virginia, IS DISMISSED. The Petition for Expedited Review of Waiver and Request for Dismissal of Application filed by MHR License LLC IS GRANTED.

Sincerely,

Albert Shuldiner
Chief, Audio Division
Media Bureau