



Federal Communications Commission
Washington, D.C. 20554

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In re: **NEW FM Translator, Durham, NC**
Facility ID No. 200547
File No. BNPFT-20180314AAN

Petition to Deny

Dear Counsel:

We have before us the above-referenced long form construction permit application (Application) for a new cross-service FM translator station (Station) filed on March 14, 2018, by WDNC-AM, LLC (WDNC-AM).¹ We also have a petition to deny the Application (Petition to Deny) filed by Radio One Licenses, LLC (Radio One), on April 4, 2018.² For the reasons stated below, we deny the Petition to Deny and grant the Application.

Background. In the Petition to Deny and Supplements, Radio One claims that the Application is unacceptable under section 74.1204(f) of the Commission's rules³ because the 1 mV/m contour of the proposed facilities would overlap a populated area receiving the regularly used, off-the-air signal of station WFXK(FM), Bunn, NC (WFXK).⁴ The Petition to Deny was pending on August 13, 2019, when

¹ See *Broadcast Applications*, Public Notice, Report No. 29196 (Mar. 20, 2018).

² On April 19, 2018, WDNC-AM filed an opposition to the Petition to Deny (Opposition). On April 30, 2018, Radio One filed a reply to the Opposition (Reply). On August 22, 2019, the Audio Division, Media Bureau (Bureau), notified Radio One that the Petition to Deny would be processed under the new rules relating to the processing of FM translator applications and gave Radio One 30 days to supplement the Petition to Deny to satisfy the new requirements. *Letter from James D. Bradshaw, Senior Deputy Chief, Audio Division, Media Bureau, to Karen Wishart, Esq, Vice President and Chief Administrative Office, Urban One, Inc.* (Aug. 22, 2019) (citing *Amendment of Part 74 of the Commission's Rules Regarding Translator Interference*, Report and Order, 34 FCC Rcd 3457 (2019)). On September 20, 2019, Radio One filed a request for an extension of time (Time Extension Request). On September 23, 2019, Radio One filed a supplement to the Petition to Deny (First Supplement). On October 18, 2019, Radio One filed another supplement to the Petition to Deny (Second Supplement) (collectively, Supplements). On November 13, 2019, WDNC-AM filed an opposition to the Supplements (Supplements Opposition).

³ 47 CFR § 74.1204(f) (effective August 13, 2019. See *infra* note 5) ("An application for an FM translator station will not be accepted for filing even though the proposed operation would not involve overlap of field strength contours with any other station, as set forth in paragraph (a) of this section, if grant of the authorization will result in interference to the reception of a regularly used, off-the-air signal of any authorized co-channel, first, second or third adjacent channel broadcast station, including previously authorized secondary service stations within the 45 dBu field strength contour of the desired station.").

⁴ Petition to Deny at 1-2.

revised section 74.1204(f) governing predicted interference claims came into effect.⁵ When it revised its translator interference rules, the Commission provided that “complaints that have not been acted upon as of the effective date of the rules adopted in this *Report and Order* will be decided based on the new rules. If necessary, parties will be given an opportunity to submit supplemental materials to address the revised rules adopted herein.”⁶ Accordingly, on August 22, 2019, the Bureau notified Radio One that it had 30 days to bring the Petition to Deny into compliance with the updated translator interference complaint requirements.⁷ On September 20, 2019, Radio One filed the Time Extension Request. On September 23, 2019, Radio One filed the First Supplement, including 15 listener complaints, and on October 18, 2019, it filed the Second Supplement, including an additional 5 complaints.⁸

In the Supplements Opposition, WDNC-AM argues that most of the listener complaints submitted with the Supplements do not meet the requirements for a valid listener complaint—specifically, that they either do not provide a complete home address or do not adequately specify the location of the predicted interference.⁹ WDNC-AM also states that a co-owned and co-branded station (both are marketed as “FOXY”), WFXC(FM), Durham, North Carolina (WFXC), operates on a separate frequency in Durham and broadcasts the same programming, so that listeners in that area have the option to listen on another channel.¹⁰ WDNC-AM submits an engineering statement indicating that the signal strength of WFXC is significantly higher than WFXK in the areas specified by the complainants.¹¹ Finally, WDNC-AM states that one of the listener complainants, Phyllis Coley-Davis (Coley-Davis), informed one of its staff members that she has a talk show on Sunday mornings on WFXK.¹² Therefore, according to WDNC-AM, the Coley-Davis complaint contains a false certification that Coley-Davis has “no legal, employment, financial, or familial affiliation or relationship” with WFXK.¹³ Radio One did not respond to this allegation.

Discussion. Pursuant to sections 309(d) and (e) of the Communications Act of 1934, as amended, a petition to deny must contain specific allegations of fact sufficient to show that grant of the application would be *prima facie* inconsistent with the public interest, convenience, and necessity.¹⁴ These allegations of fact, except for those of which official notice may be taken, must be supported by an affidavit or declaration under penalty of perjury of someone with personal knowledge of the facts alleged.¹⁵ A petition to deny based on section 74.1204(f) must establish that grant of the subject

⁵ See *Amendment of Part 74 of the Commission’s Rules Regarding Translator Interference*, Report and Order, 34 FCC Rcd 3457 (2019) (*Translator Interference Order*) (petitions for reconsideration pending); *Media Bureau Announces August 13, 2019, Effective Date of Amended Rules for FM Translator Interference*, Public Notice, 34 FCC Rcd 7004 (MB 2019).

⁶ *Translator Interference Order*, 34 FCC Rcd at 3482, para. 49 (internal citation omitted).

⁷ See *Letter from James D. Bradshaw, Senior Deputy Chief, Audio Division, Media Bureau, to Karen Wishart, Esq., Vice President and Chief Administrative Office, Urban One, Inc.* (Aug. 22, 2019) (*Deficiency Letter*). The *Deficiency Letter* identified a number of deficiencies, including the minimum number of valid listener complaints, relevant maps, and requisite certifications.

⁸ See First Supplement, Attach. A; Second Supplement, Attach. B.

⁹ Supplements Opposition at 2-3.

¹⁰ *Id.* at 4-6

¹¹ *Id.*, Attach. A (Declaration of William Patnaud).

¹² *Id.* at 4.

¹³ *Id.* at 4.

¹⁴ 47 U.S.C. § 309(a); see also, e.g., *WWOR-TV, Inc.*, Memorandum Opinion and Order, 6 FCC Rcd 193, 197 n.10 (1990); *Area Christian Television, Inc.*, Memorandum Opinion and Order, 60 RR 2d 862, 864 (1986).

¹⁵ 47 U.S.C. § 309(d).

application “will result in interference to the reception” of an existing station within the affected station’s 45 dBu signal strength contour.¹⁶ Such a claim must contain the following: (1) the minimum number of valid listener complaints set out in Table 1 to section 74.1203(a)(3);¹⁷ (2) a map plotting the specific location of the alleged interference in relation to the complaining station’s 45 dBu contour; (3) a statement that the complaining station is operating within its licensed parameters; (4) a statement that the complaining station licensee has used commercially reasonable efforts to inform the relevant translator licensee of the claimed interference and attempted private resolution; and (5) U/D data demonstrating that at each listener location the undesired to desired signal strength exceeds the limits specified in section 74.1203(f)(5).¹⁸ Radio One has failed to meet above requirements (1), (2), and (5) because most of the listener complaints submitted with the Petition to Deny and Supplement are not valid, for the following reasons.

Based on the population within WFXK’s 60 dBu service contour, Radio One must submit a minimum of 15 valid listener complaints to support its claim of predicted interference from the Station.¹⁹ To be considered valid, each listener complaint must be signed and dated by the listener and contain the following information: (1) the complainant’s full name, address, and phone number; (2) a clear, concise, and accurate description of the location where interference is alleged or predicted to occur; (3) a statement that the complainant listens over-the-air to the desired station at least twice a month; and (4) a statement that the complainant has no legal, financial, employment, or familial affiliation or relationship with the desired station.²⁰

As explained in the *Translator Interference Order*, an appropriate description of the location where interference is predicted to occur would include map coordinates, street addresses, street intersections, or other descriptions such as “along Route XX near mile marker XX” or “between Exits 1 and 2 on Route XX.”²¹ Unacceptable descriptions would include general locations such as “on my way to work” or “downtown.” The purpose of this requirement is to identify whether the locations are within the complaining station’s 45 dBu contour and to provide the translator with sufficient information to determine what measures are necessary to resolve the complaint.²²

In this case, 17 of the 20 listener complaints submitted by Radio One do not contain a “clear, concise, and accurate description of the location where interference is alleged or predicted to occur.” Five complaints contain no description of the location but are accompanied by maps with hand- or computer-drawn marks.²³ These maps are not signed and therefore cannot be verified to originate with the listener complainant. Twelve complaints include a description that is unacceptably vague, consisting of, for example, an entire highway, street, or neighborhood such as “15-501,” “downtown Durham,” “Southpoint” or “UNC campus.”²⁴ Under the guidance provided in the *Translator Interference Order*, a

¹⁶ 47 CFR § 74.1204(f).

¹⁷ 47 CFR § 74.1203(a).

¹⁸ 47 CFR § 74.1204(f).

¹⁹ See First Supplement at 2 (calculating the population within the WFXK 60 dBu contour to be 1,421,654 people); 47 CFR § 74.1203(a)(3).

²⁰ 47 CFR § 74.1204(k).

²¹ *Translator Interference Order*, 34 FCC Rcd at 3466, n.65.

²² *Id.*

²³ See Statements of Lisa Greene, Kelly Foster, Sherry Wallace, Juanita Harris, and Angela Brown.

²⁴ See Listener Complaints of Tiffany N. Lowe-Payne, Kamren Thomas, Tanisha Toomer, Bria Byrd, Meiena Riggsbee, Marcia Simpson, Jamonte Bethea, Chenique Jones, Turkessa Crump, Che’ Wells, Kipland DeCosta Breeze II, and Shamecca Caines. The remaining complainant, Ashley Harper, did not provide a complete address

location that is a stretch of road must include an additional identifier such as a cross-street, mile marker, or exit number so that the location can be objectively mapped. An individual listener may submit multiple such specifically defined listening locations; however, a more generalized description, such as the name of an entire highway, town, or city neighborhood, cannot support a valid listener complaint nor adequately define the remedial obligations of the translator at issue. For this reason, we find that Radio One has failed to submit the required minimum number of valid listener complaints.

Regarding WDNC-FM's allegation of false certification, the Commission "relies heavily on the honesty and probity of its licensees in a regulatory system that is largely self-policing."²⁵ Specifically, as the Commission made clear in the *Translator Interference Order*, "[i]t is the responsibility of the complaining station to verify the validity of listener complaints, including those submitted electronically, and failure to do so or knowingly submitting false information will be subject to strict enforcement measures."²⁶ Finally, section 1.17 of the rules states that any holder of a Commission license may not "provide material factual information that is incorrect or misleading without a reasonable basis for believing that any such material factual statement is correct and not misleading."²⁷

In this case, WDNC-AM alleges that Coley-Davis has a "regular Sunday morning talk show" on WFXK.²⁸ This allegation is based on information provided to the declarant William Patnaud by unidentified WDNC-AM staff.²⁹ Therefore, it does not meet the requirement that an allegation be supported by the declaration of someone with personal knowledge of the facts. Likewise, the website that WDNC-AM cites does not demonstrate that Coley-Davis currently broadcasts a regular program on WFXK, although it appears that she may have in the past. We conclude that the record here does not support an enforcement action under section 1.17. Because we deny the Petition on other grounds, we do not find further inquiry into the validity of the Coley-Davis Complaint to be necessary at this time. However, we caution Radio One to be attentive in the future to its obligation to verify the information contained in its listener complaints, including the required certifications and that the complaint be either personally or electronically signed by the listener.

Finally, we note that most of the areas described by listeners in this case are outside the 60 dBu contour of WFXK but within the 60 dBu contour of WFXK's sister station WFXC. Both stations are branded as "FOXY" and broadcast the same programming.³⁰ Because of the signal overlap, the same programming, the similarity of the two callsigns, and the fact that both stations are branded as "FOXY," we find that there is a potential for consumer confusion between these stations. Therefore, we direct Radio One, if it chooses to pursue any further interference claims regarding these stations, to ensure that its standardized listener complaint makes a clear distinction between these two stations—including avoiding, where possible, generalized references to "FOXY"—so that listeners understand which station may be affected.

and is therefore unacceptable as well. However, we find that the Lorna West complaint is acceptable, because the address is complete and the point at which highway 15-501 enters Chapel Hill can be accurately plotted.

²⁵ *Contemporary Media, Inc. et al. v. FCC*, 214 F.3d 187, 193, 196 (D.C. Cir. 2000) (citing *Leflore Broad. Co. v. FCC*, 636 F.2d 454, 461 (D.C. Cir. 1980) ("[E]ffective regulation is premised upon the agency's ability to depend upon the representations made to it by its licensees. . .")).

²⁶ *Translator Interference Order*, 34 FCC Rcd at 3467, para. 17.

²⁷ 47 CFR § 1.17(a)(2).

²⁸ Supplements Opposition at 4.

²⁹ *Id.*, Attach. A (Declaration of William Patnaud).

³⁰ See FOXY Home Page, <https://foxync.com/>.

Conclusion/Actions. For these reasons, IT IS ORDERED that the petition to deny filed by Radio One Licenses, LLC, on April 4, 2018, IS DENIED and the long form construction permit application for a new cross-service FM translator station filed on March 14, 2018, by WDNC-AM, LLC, File No. BNPFT-20180314AAN, IS GRANTED.

Sincerely,

Albert Shuldiner
Chief, Audio Division
Media Bureau