



Federal Communications Commission
Washington, D.C. 20554

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DA 22-138
In Reply Refer to:
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In re: **WGBH Education Foundation**
W242AA, Beacon Hill, Massachusetts
Facility ID No. 72093
Application File Nos. 115764 (filed June 3, 2020)
125291 (filed Nov. 2, 2020)

Informal Request for Commission Action
Informal Objection

Dear Counsel:

We have before us: (1) a letter submitted by WGBH Education Foundation (WGBH) on August 18, 2020 (Cancellation Letter), seeking to surrender the above-referenced construction permit (WGBH Construction Permit)¹ for FM translator station W242AA, Beacon Hill, Massachusetts (WGBH Translator) and an objection² to the Cancellation Letter submitted by Beanpot License Corp. (Beanpot) on August 24, 2020 (Cancellation Objection);³ and (2) the above-referenced application to modify the

¹ See Application File No. 115764 (First Modification Application). The First Modification Application was granted on June 24, 2020. *Broadcast Actions*, Public Notice, Report No. PN-2-200626-01 (MB June 26, 2020).

² See Pleading File No. 120665. The Cancellation Objection is self-titled as an “Opposition to Request to Surrender Construction Permit for Cancellation.” Although there is no formal process in our rules for objecting to a request to surrender a construction permit, we will consider the Cancellation Objection as an informal request for Commission action under 47 CFR § 1.41.

³ On September 4, 2020, WGBH submitted a “Reply to Opposition of Beanpot License Corp” (Cancellation Reply).

facilities of the WGBH Translator (Second Modification Application) filed by WGBH on November 2, 2020,⁴ and an informal objection to the Second Modification Application filed by Beanpot on November 3, 2020 (Second Modification Objection).⁵ For the reasons stated below, we deny the Cancellation Objection, cancel the WGBH Construction Permit, deny the Second Modification Objection, and grant the Second Modification Application.

Background. *Cancellation Letter.* On June 3, 2020, WGBH filed the First Modification Application, seeking to move the WGBH Translator to a new site (New MIT Building) immediately adjacent to its licensed site.⁶ WGBH also proposed a non-adjacent channel change from Channel 242 to Channel 247, explaining that this change would eliminate contour overlap with first-adjacent channel full-service station WSRS(FM), Worcester, Massachusetts.⁷ The Media Bureau granted the First Modification Application on June 24, 2020.⁸

On June 25, 2020, Beanpot submitted an application (Beanpot Modification Application) to modify the facilities of FM translator station W243DC, Needham, Massachusetts (Beanpot Translator).⁹ The Beanpot Modification Application specified facilities that would only become available if WGBH vacated Channel 242. On July 16, 2020, the Bureau granted the Beanpot Modification Application (Beanpot Translator Construction Permit), the grant of which is now final.¹⁰ The Beanpot Translator Construction Permit included a condition that the Beanpot Translator may not operate or be licensed at its modified facilities until the WGBH Translator commences operation or is licensed at the facility proposed in the First Modification Application (Beanpot Contingency Condition).

On July 27, 2020, a full-service licensee, WJFD-FM, Inc. (WJFD), filed a petition for reconsideration of the grant of the First Modification Application on the basis that it would cause predicted interference to station WJFD-FM, New Bedford, Massachusetts (WJFD Petition).¹¹ On August 6, 2020, Beanpot filed an opposition to the WJFD Petition.¹² On August 18, 2020, WGBH submitted the

See Pleading File No. 121185. On September 8, 2020, Beanpot submitted a “Response to Reply to Opposition to Request to Surrender Construction Permit for Cancellation” (Cancellation Response). *See* Pleading File No. 121259. On September 15, WGBH submitted a “Submission for the Record” (Cancellation Supplement). *See* Pleadings File No. 121680. On September 21, 2020, Beanpot submitted a “Further Reply” (Cancellation Supplement Reply). *See* Pleading File No. 121926.

⁴ *See* Application File No. 125291.

⁵ Pleading File No. 125357. On November 13, 2020, WGBH filed an opposition to the Second Modification Objection (Pleading File No. 126021) (Second Modification Opposition), to which Beanpot replied on November 17, 2020 (Pleading File No. 126208) (Second Modification Reply).

⁶ First Modification Application, attachment entitled “W242AA Engineering Exhibits” at 1 (First Modification Engineering Exhibit).

⁷ First Modification Engineering Exhibit at 1.

⁸ *Broadcast Actions*, Public Notice, Report No. PN-2-200626-01 (MB June 26, 2020).

⁹ Application File No. 116539. The Beanpot Modification was not contested and was not the subject of a petition for reconsideration.

¹⁰ *Broadcast Actions*, Public Notice, Report No. PN-2-200720-01 (MB July 20, 2020) (Beanpot Translator Construction Permit).

¹¹ Pleading File No. 118532.

¹² Pleading File No. 120206.

Cancellation Letter, stating that it intended to continue to operate the WGBH Translator on Channel 242. On August 24, 2020, Beanpot submitted the Cancellation Objection.

In the Cancellation Objection and Cancellation Response, Beanpot cites to two Bureau decisions, *Krum* and *Price*, to support its claim that once the Bureau grants a translator modification application, the applicant must carry out the approved channel change and has “at best an implied STA” to continue operating on its original frequency while it constructs the new facility.¹³ Beanpot contends that “there is no reason why the reasoning contained therein is not applicable to FM translators . . .”¹⁴ In this respect, Beanpot argues, translator applicants, like all applicants, are subject to the basic principle that an applicant must stand “ready, willing, and able” to construct and operate as proposed.¹⁵ Therefore, Beanpot urges, we should find that WGBH may not surrender the WGBH Construction Permit and must construct the facility authorized therein: “WGBH’s only course of action at this time is to complete the work on the [WGBH Translator] within the term of its duly awarded and now final permit.”¹⁶ Finally, Beanpot disputes the validity of the predicted interference showing provided in the WJFD Petition and argues that even if interference was shown, the correct solution would be for WGBH to address that interference through the modification—not cancellation—of the WGBH Construction Permit.¹⁷

In the Cancellation Reply, WGBH explains that it has chosen not to change channels because “[i]nformation provided by WJFD has demonstrated to WGBH that it would not be practical for WGBH to build out on channel 247.”¹⁸ WGBH contends that the process discussed in the *Krum* and *Price* cases relates only to full-service stations and that FM translators are not subject to these procedures: “All of Beanpot’s arguments concerning the Table of Allotments, the Commission’s processes, and ‘implied STAs’ concern rules that do not apply to WGBH’s W242AA licensed translator station or to WGBH’s cancellation of a short-lived construction permit concerning the station’s channel of operation.”¹⁹ Therefore, WGBH concludes, the Cancellation Letter is “entirely consistent with the Commission’s rules.”²⁰

In a separate procedural argument, Beanpot claims that WGBH erred by informally notifying Beanpot rather than formally serving it with the Cancellation Letter as required by the *ex parte* rules.²¹ Beanpot asserts that, as a party to the First Modification Application, it was entitled to be served with any

¹³ Cancellation Objection at 2-3 (citing *Brian M. Madden, Esq.*, Letter Decision, 25 FCC Rcd 4765, 4767 (MB 2010) (*Krum*)); Cancellation Response at 2 (citing *Mark N. Lipp, Esq.*, Letter Decision, 31 FCC Rcd 8916, 8921 (MB 2016) (*Price*) (“[I]n channel substitution situations, the affected station has at best an ‘implied STA’ to remain on its old frequency until it is ready for operation on its new frequency.”)). Beanpot also notes that, if necessary, the Commission may cancel the implied STA and order the dilatory station to cease broadcasting on its old frequency. Cancellation Objection at 2

¹⁴ Cancellation Response at 2.

¹⁵ *Id.* at 2 (citing *Pathfinder Communications Corp.*, Memorandum Opinion and Order, 18 FCC Rcd 9272, 9279 (2003)).

¹⁶ Cancellation Objection at 2-3.

¹⁷ Cancellation Response at 3.

¹⁸ Cancellation Reply at 2. The parties also debate whether a party may oppose a translator licensee’s decision to surrender a construction permit. As explained *supra*, note 2, we consider the Cancellation Objection as an informal request for Commission action under 47 CFR § 1.41.

¹⁹ *Id.* at 2.

²⁰ *Id.* at 2.

²¹ Cancellation Objection at 2 (citing 47 CFR §§ 1.1202(d) and 1.1208).

presentations made to the Commission in that proceeding. According to Beanpot, the Cancellation Letter constitutes a presentation on the merits for *ex parte* purposes because the requested termination of the First Modification Application proceeding through the cancellation of the WGBH Construction Permit is an “outcome, or consequence” of the Cancellation Letter.²²

In the Cancellation Supplement, WGBH responds that the Cancellation Letter was not a “communication directed to the merits or outcome” of the proceeding and that its “voluntary decision to surrender the permit does not turn a routine notice of that decision into a ‘presentation’ under the *ex parte* rules.”²³ WGBH also states that Beanpot was not prejudiced by not being served with a copy of the Cancellation Letter because WGBH directly, albeit informally, notified Beanpot that WGBH had requested cancellation of the WGBH Construction Permit.²⁴

Second Modification Application. On November 2, 2020, WGBH filed the Second Modification Application, again seeking approval to move to the New MIT Building but remaining on channel 242, operating at a lower power (3 watts ERP), and rebroadcasting a different primary station (WGBH, Boston, Massachusetts, in lieu of WCRB, Lowell, Massachusetts). In the Second Modification Application, WGBH asserts that the proposed facilities will not cause any prohibited contour overlap with the licensed Beanpot Translator.²⁵ It also states that the proposed WGBH Translator facilities would comply with section 74.1204(c) with respect to the first adjacent channel facility authorized in the Beanpot Modification Application because the area of existing overlap between the proposed WGBH Translator and the proposed Beanpot Translator would not increase as compared to the existing overlap between the licensed WGBH Translator and the proposed Beanpot Translator (in fact, would slightly decrease).²⁶ In any case, WGBH argues, the proposed Beanpot Translator is required to protect the WGBH Translator under the terms of the Beanpot Translator Construction Permit.²⁷

In the Second Modification Objection, Beanpot reiterates that “there is no option, once an application is granted, to return to a previously occupied channel.”²⁸ According to Beanpot, the Beanpot Translator is only required to protect the WGBH Translator “while it operated under its implied STA on

²² Cancellation Supplement Reply at 1 (citing *Group W. Radio, Inc.*, Memorandum Opinion and Order, 10 FCC Rcd 1080 (1995); *Choctaw Broadcasting Corp.*, Memorandum Opinion and Order, 12 FCC Rcd 8534 (1997) (*Choctaw*)).

²³ Cancellation Supplement at 2.

²⁴ *Id.* at 2 .

²⁵ Second Modification Application, Attach. entitled “W242AA engineering exhibits” (Second Modification Application Engineering Exhibit).

²⁶ See 47 CFR § 74.1204(c) (“An application for a change (other than a change in channel) in the authorized facilities of an FM translator station will be accepted even though overlap of field strength contours would occur with another station in an area where such overlap does not already exist, if: (1) The total area of overlap with that station would not be increased; (2) The area of overlap with any other station would not increase; (3) The area of overlap does not move significantly closer to the station receiving the overlap; and, (4) No area of overlap would be created with any station with which the overlap does not now exist.”). In making the same showing in the Beanpot Modification Application, Beanpot stated that “[The WGBH Translator] has been omitted from this study, as the building where the translator transmitting facilities are located is being demolished, and this translator is changing frequency to Channel 247D.” Beanpot Modification Application, Attach. entitled “FM Translator Facilities and Allocation Considerations.”

²⁷ Second Modification Application Engineering Exhibit at 3.

²⁸ Second Modification Objection at 3.

Channel 242” and that such protection “certainly would not apply to any further license modification on its former channel.”²⁹

Beanpot also argues that the Second Modification Application is prohibited as a multiple application under section 73.3520 of the rules, which states that “Where there is one application for new or additional facilities pending, no other application for new or additional facilities for a station of the same class to serve the same community may be filed by the same applicant, or successor or assignee, or on behalf of, or for the benefit of the original parties in interest. Multiple applications may not be filed simultaneously.”³⁰ Beanpot concedes, however, that an applicant may file a second modification application without violating section 73.3520 if the first application is voluntarily dismissed by the applicant, as occurred when Beanpot voluntarily dismissed a previous modification application in order to file the Beanpot Modification Application for the Beanpot Translator.³¹

Finally, Beanpot contends that the Second Modification Application is incomplete because it should have contained an acknowledgement that the increased power requested in the Beanpot Application was only made possible by the First Modification Application channel change.³²

Discussion. We find no merit to Beanpot’s objections to the Cancellation Letter and Second Modification Application, as explained below.

Applicability of full service channel change procedure. We reject Beanpot’s contention that the rules, statutory considerations, and policies applicable to full service FM commercial channel assignments should also govern translator channel changes. The cases cited by Beanpot do not support its suggestion that we extend all or part of the full service channel change process to translators, and we decline to do so, for the reasons set out below.

In brief, the full service channel change process is as follows. When the Commission grants a channel change modification application for a full-service FM commercial station, it concurrently modifies the station’s license (either by order, letter decision, or as a condition of the resulting construction permit).³³ As seen in the *Krum* and *Price* decisions, this license modification creates an obligation to move to the new (licensed) channel; the station retains only an implied STA to continue to

²⁹ Second Modification Objection at 4.

³⁰ *Id.* at 2-3 (citing 47 CFR § 73.3520).

³¹ *Id.* at 3, n.3. On June 26, 2020, the Bureau cancelled Application File No. BMPFT-20190806AAB (previously granted on September 3, 2019) at Beanpot’s request. *Broadcast Actions*, Public Notice, Report No. 49771 (MB July 1, 2020) (First Beanpot Application).

³² *Id.* at 3-4.

³³ See, e.g., *1998 Biennial Regulatory Review – Streamlining of Radio Technical Rules in Parts 73 and 74 of the Commission’s Rules*, Notice of Proposed Rulemaking and Order, 13 FCC Rcd 14849, 14855, para. 12, n.22 (1998) (*1998 Biennial NPRM*) (explaining that grant of a one-step FM commercial station application to change channel modifies that station’s license to specify the new channel).

operate on its former channel.³⁴ The obligation to change channel inheres whether the ordered channel change is voluntary or involuntary.³⁵

In contrast, when the Commission issues a construction permit for a translator channel change, the station's license is not modified until the permittee voluntarily constructs the proposed facility and applies for a license to cover. In this situation, the consequence of a failure to construct by the authorized deadline is merely the expiration of the construction permit, without an impact on the underlying license.³⁶ If a translator permittee determines prior to permit expiration that it will not construct as authorized, the Commission will routinely cancel its construction permit upon request, thus enabling the same or another applicant to file an otherwise mutually exclusive application.³⁷ As is the case with a failure to construct, a voluntary cancellation of a construction permit does not impact the station's previously existing license. Therefore, in this case, we find that WGBH is not required to construct the facilities authorized in the WGBH Construction Permit and may surrender it at will.

Multiple applications. Section 73.3520, which prohibits the filing by the same applicant of an application for a station of the same class to serve the same community, does not preclude grant of the Second Modification Application.³⁸ Section 73.3520 reflects the Commission's intent to expedite its processing procedures "by avoiding the disruption of having two inconsistent applications contemporaneously being studied by the staff" when only one can be granted.³⁹ The Commission has long allowed applicants in all services to resolve section 73.3520 conflicts by choosing not to prosecute one of the applications involved.⁴⁰ Here, WGBH's surrender of the WGBH Construction Permit eliminated any conflict with the Second Modification Application.

Contingency. We reject Beanpot's argument that the Second Modification Application should have included more information about its interaction with the Beanpot Modification Application. As the Beanpot Contingency Condition acknowledges, the Beanpot Modification Application is in effect contingent on the construction of the facilities specified in the First Modification Application. With the exception set out in section 73.3517(e) of the rules (applications with the same filing date, including a contingency agreement, etc.), contingent applications have long been disallowed⁴¹ for the very reason

³⁴ See *1998 Biennial NPRM*, 13 FCC Rcd at 14855, para. 12, n.22). ("If the permittee fails to timely construct and lets its permit lapse, the permittee is not relieved of the obligation to change to the channel and class specified in the amended Table of Allotments"); *Krum*, 25 FCC Rcd at 4767 (holding that where the Commission had issued a permit for a new channel after issuing a report and order modifying the station's license, the permittee was required to complete construction and operate on the new channel); *Price*, 31 FCC Rcd at 8920-21 (admonishing a licensee for failure to carry out a channel substitution order).

³⁵ See *Entravision Holdings, LLC*, Memorandum Opinion and Order, FCC 22-4 (rel. Jan. 25, 2022) at 8-9, paras. 25-27.

³⁶ See 47 CFR § 73.3598(e) ("Any construction permit for which construction has not been completed and for which an application for license has not been filed, shall be automatically forfeited upon expiration without any further affirmative cancellation by the Commission."); 47 U.S.C. § 319(b).

³⁷ See, e.g., the First Beanpot Application, *supra* note 29.

³⁸ 47 CFR § 73.3520.

³⁹ See, e.g., *Radio Representatives, Inc.*, Hearing Designation Order, 5 FCC Rcd 1894, 1896, para. 16 (1990) (citing *KKAP Broadcasting Co.*, Letter Decision, 63 FCC.2d 235, 236 (1976)).

⁴⁰ See *American Television of Utah, Inc.*, Decision Letter, 91 FCC.2d 267, 268 (1982).

⁴¹ See 47 CFR § 73.3517 ("Contingent applications for new stations and for changes in facilities of existing stations are not acceptable for filing."); *1998 Biennial Regulatory Review – Streamlining of Radio Technical Rules in Parts 73 and 74 of the Commission's Rules*, First Report and Order, 14 FCC Rcd 5272, para. 14, n.44 (1998) ("We adopt

illustrated by this proceeding, namely, to avoid the administrative burdens and conflicts associated with follow-up applications that are “contingent on the [first applicant]’s successful prosecution of its application to change channels.”⁴² The Beanpot Modification Application does not meet the Commission’s requirements for a permissible contingent application as set out in section 73.3517(e).⁴³ Therefore, we find that the Beanpot Construction Permit was issued in error. Although grant of the Beanpot Modification Application is final and not subject to reconsideration, we note that because we are cancelling the WGBH Construction Permit, Beanpot cannot satisfy the Beanpot Contingency Condition. Therefore, the Beanpot Construction Permit is essentially a nullity.

Ex parte issues. Because the Cancellation Letter related to the ultimate disposition of the First Modification Application and associated pleadings, we find that it constituted a form of presentation⁴⁴ subject to the *ex parte* rules.⁴⁵ Beanpot was a party to the First Modification Application by virtue of its opposition to the WJFD Petition. Therefore, in this case, WGBH should have served Beanpot with a copy of the Cancellation Letter rather than informally notifying Beanpot of the cancellation request. However, Beanpot did not offer any evidence that the omission was willful or repeated or that it was prejudiced by WGBH’s failure to do so.⁴⁶ The purpose of the *ex parte* rules is to ensure that the agency’s decisions are fair and impartial and based on a public record free of influence from non-record communications between decision-makers and outside persons.⁴⁷ This purpose was not undermined by WGBH’s failure to formally serve Beanpot with the Cancellation Letter. However, we clarify that the *ex parte* rules apply in this situation and caution WGBH to be more attentive to these requirements in the future.

Conclusion/Actions. For the reasons set forth above, IT IS ORDERED that the Cancellation Objection filed by Beanpot License Corp. on August 24, 2020, IS DENIED and the WGBH Construction Permit (Application File No. 115764) IS CANCELLED.

IT IS FURTHER ORDERED that the Second Modification Objection filed by Beanpot License Corp. on November 3, 2020, IS DENIED and the Second Modification Application (Application File No. 125291) filed by WGBH on November 2, 2020, IS GRANTED.

no change in our current policy of not accepting any application filed ‘contingent’ on the grant of a license application to cover an outstanding permit of another station”); *Amendment of Sections 1.517 and 1.520 of the Commission’s Rules*, Report and Order, 38 FCC.2d 238, 128 (1976) (“[W]hen an FM application is contingent on the effectuation of a second station’s facility modification application, in most instances the first station must wait for the grant of the second station’s covering license application before filing a construction permit application”).

⁴² *Selma Television Inc.*, Memorandum Opinion and Order, 29 FCC.2d 522, 525, n.5 (1971).

⁴³ 47 CFR § 73.3517(e) (“The Commission will accept up to four contingently related applications filed by FM licensees and/or permittees for minor modification of facilities. Two applications are related if the grant of one is necessary to permit the grant of the second application. Each application must state that it is filed as part of a related group of applications to make changes in facilities, must cross-reference each of the related applications, and must include a copy of the agreement to undertake the coordinated facility modifications. All applications must be filed on the same date.”).

⁴⁴ See 47 CFR § 1.1202(a) (defining a presentation as a “communication directed to the merits or outcome of a proceeding”).

⁴⁵ See 47 CFR § 1.1202(b).

⁴⁶ See *Choctaw*, 12 FCC Rcd at 8414; *John F. Garziglia, Esq.*, Letter, 22 FCC Rcd 8409 (2007).

⁴⁷ *Ex Parte Communications*, Report and Order, 2 FCC Rcd 3011, 3012 (1987).

IT IS FURTHER ORDERED that the petition for reconsideration of the grant of Application File No. 115764, filed by WJFD-FM, Inc. on July 27, 2020, IS DISMISSED as moot.

Sincerely,

Albert Shuldiner
Chief, Audio Division
Media Bureau