

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

In the Matter of)	
)	
Angelo State University)	BNPL-20010611AEH
)	
For Application for a New Low Power FM)	Facility ID # 133890
Broadcast Station in San Angelo, Texas)	
)	
)	
)	

MEMORANDUM OPINION AND ORDER

Adopted: September 30, 2004

Released: December 16, 2004

By the Commission: Commissioners Copps and Adelstein concurring and issuing a joint statement.

1. On December 13, 2002, Angelo State University (“ASU”) filed an Application for Review¹ of the November 15, 2002, Media Bureau (“Bureau”) staff decision (“Staff Decision”) denying ASU’s request for waiver of Commission rules and dismissing ASU’s low power FM (“LPFM”) station application.² For the reasons discussed below, we deny ASU’s application for review.

2. On June 11, 2001, ASU filed a new Channel 292 (106.3 MHz) LPFM station application for San Angelo, Texas.³ The Public Notice announcing the filing window in which ASU filed its application required that LPFM applications protect, *inter alia*, all full-service FM authorizations.⁴ However, ASU’s proposed transmitter site failed to meet the Commission’s minimum spacing requirements.⁵ Specifically, ASU’s proposed site was only 9.8 kilometers from that of a first-adjacent

¹ ASU’s pleading is styled as a “Memorandum” requesting “Review by the full Commission.” We will consider the pleading as an Application for Review under 47 C.F.R. § 1.115.

² *Letter to Angelo State University*, reference 1800B3 (M.Bur. Nov. 15, 2002).

³ Application BNPL-20010611AEH.

⁴ *See Public Notice, Low Power FM Filing Window*, 16 FCC Rcd 7915 (MMB Apr. 10, 2001), citing 47 C.F.R. § 73.807, and stating, “LPFM applications filed during this window must protect all FM, FM Translator, FM Booster, and TV Channel 6 authorizations. LPFM applications must also protect pending broadcast applications in these services that were filed prior to the date of this Notice, along with LPFM applications filed in the previous filing windows.”

⁵ *See* 47 C.F.R. § 73.807.

channel full-power FM station KMDX(FM) San Angelo, Texas. Commission rules require a distance of 80 kilometers between such facilities.⁶

3. On June 12, 2002, ASU filed an amendment to its application, requesting that the channel be modified to Channel 282, to avoid the spacing conflict with KMDX. Because the amendment proposed a major change to its application, ASU requested a waiver of the Commission's window filing rules.⁷ In support of its waiver request, ASU argued that it was unaware of the short-spacing problem with KMDX, stating that "the full power license to cover was granted five days after we applied for the LPFM license."⁸

4. The Commission's rules allow only minor change technical amendments after the close of an LPFM filing window.⁹ Under the applicable rule, minor changes to LP100 applications are limited to those specifying changes in site of two kilometers or less. All requested changes in channel are considered "major."¹⁰ In the Staff Decision, the Bureau found that, while KMDX's license application was granted shortly after ASU's application was filed in June of 2001, the fact was not relevant to the processing of ASU's application, and thus did not warrant waiver of the rule. Specifically, the Bureau noted that KMDX's underlying application for a construction permit was filed on September 7, 2000, and was granted on December 14, 2000, well before ASU's application was filed. The Bureau then afforded ASU's waiver request a "hard look" under the *WAIT* doctrine,¹¹ but found insufficient justification establishing that a waiver of the Commission's rules would be in the public interest. The Bureau therefore denied ASU's request for waiver, returned the proffered amendment, and dismissed ASU's San Angelo LPFM application. On December 13, 2002, ASU filed the instant "Memorandum," requesting review by the full Commission.

5. *Discussion.* When an applicant seeks waiver of a rule, it must plead with particularity the facts and circumstances which would support a deviation from the general rule.¹² ASU has failed to show why the Commission should waive its rules and allow the submission of a major change amendment almost one year after the filing deadline. ASU's sole argument, that it did not know of the co-channel minimum spacing conflict with KMDX until after it filed its original LPFM application, is not persuasive. As noted in the Staff Decision, KMDX's construction permit was granted by the Commission nearly six months prior to ASU's original application filing. Both the Commission's rules and the Public Notice announcing the LPFM filing window required that pending construction permit authorizations be protected by all LPFM applications.¹³ ASU does not claim that, due to an error in the Commission's

⁶ *Id.*

⁷ ASU requested a waiver of 47 C.F.R. § 73.871(c), which provides that only minor change technical amendments are permitted after the close of an LPFM filing window.

⁸ ASU amendment Exhibit 1.

⁹ 47 C.F.R. §73.871(c).

¹⁰ *Id.*

¹¹ *WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969).

¹² *Columbia Communications Corp. v. FCC*, 832 F.2d 189, 192 (D.C. Cir. 1987).

¹³ *See supra* n.4.

database, it could not have known of the KMDX construction permit application and grant.¹⁴ Therefore, ASU should have known of the spacing conflict with KMDX well before filing its LPFM application, and it fails to provide any explanation regarding its failure to take into account the outstanding construction permit. In essence, ASU asks that the Commission waive the “major change” rule solely to correct its own error. This is not an appropriate ground for waiver. Further, permitting applicants to file such major amendments after the close of the window – with full knowledge of the technical parameters of all other applications filed in the window – would undermine the window filing system instituted for the LPFM services. ASU has offered no additional argument or evidence showing why the Commission should waive its rule regarding major change amendments.

6. Accordingly, IT IS ORDERED, that the Application for Review filed by Angelo State University on November 26, 2003, IS HEREBY DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

¹⁴ *Compare Star Development Group, Inc.*, 17 FCC Rcd 13127, 13130 (2002) (where an application is patently defective due to an erroneous Commission database record and there exists an administratively feasible solution that will not prejudice any other timely filed application, the public interest favors waiving the “major change” rule).

**JOINT STATEMENT OF
COMMISSIONERS MICHAEL J. COPPS AND JONATHAN S. ADELSTEIN
CONCURRING**

*Re: Angelo State University For Application of a New Low Power FM Broadcast Station
in San Angelo, Texas*

We concur that, under our rules, Angelo State University's request is a major change. Nevertheless, our action today prevents the University from contributing to localism, diversity and competition on the airwaves in the San Angelo community. To promote the broadest use of the spectrum, we should consider granting additional flexibility or opening another filing window for the many schools and other noncommercial entities that, like Angelo State University, want to offer new low power FM radio services wherever possible.