

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

In the Matter of)	
)	
Educational Media Foundation)	
)	
Application for a Construction Permit for a Minor Change to a Licensed Facility)	File No. BPFT-20130416AAG
)	
Station W267AT, Sherburne, New York)	Facility ID No. 140739
)	

MEMORANDUM OPINION AND ORDER

Adopted: December 10, 2014

Released: December 10, 2014

By the Commission:

1. In this Memorandum Opinion and Order, we deny the Application for Review filed by Educational Media Foundation (“EMF”) on December 2, 2013. EMF seeks review of an October 31, 2013, action by the Media Bureau (“Bureau”),¹ which denied EMF’s Petition for Reconsideration of a June 10, 2013, letter decision dismissing the above-captioned application (“Application”) of EMF to move the transmitter site for its FM translator Station W267AT, Sherburne, New York, (“Station”) to a new site at Oneonta, New York.² At the proposed site, the Station would rebroadcast EMF’s primary noncommercial educational (NCE) Station WKVU(FM), Utica, New York. The Station’s proposed facilities do not overlap the 60 dBu contour of its existing facilities, so the Application is considered a major change under Section 74.1233(a)(1) of the Rules.³ However, the Application includes a request for waiver of Section 74.1233(a)(1) to permit the proposed move using a minor change application (“Waiver Request”).

2. EMF seeks waiver based on the Bureau’s 2011 *Mattoon* case.⁴ In *Mattoon*, the Bureau found that waiver of Section 74.1233(a)(1) was in the public interest because: (1) the translator modification applicant did not have a history of filing serial minor modification applications; (2) the proposed site was mutually exclusive with the licensed facility; (3) the proposed move was not in an LPFM spectrum-limited market; and (4) the translator would rebroadcast an AM station as an AM fill-in translator.⁵ EMF concedes that its subject proposal would not be used to rebroadcast an AM station. However, it contends that it *satisfies* the fourth criterion because “the public interest of the grant of the Application would be in many ways like the benefits enjoyed by the applicant in [*Mattoon*], saving

¹ David D. Oxenford, Esq., Letter, 28 FCC Rcd 14913 (MB 2013) (“*Reconsideration Decision*”).

² Educational Media Foundation, Letter, Ref. No. 1800B3-RG (MB 2013) (“*Staff Decision*”).

³ 47 C.F.R. § 74.1233(a)(1). The purpose of the overlap requirement is “[t]o prevent . . . FM translator stations from abandoning their present service areas.” *1998 Biennial Regulatory Review*, Notice of Proposed Rulemaking, 13 FCC Rcd 14859, 14872 (1998); First Report and Order, 14 FCC Rcd 5272, 5277 (1999).

⁴ See John F. Garziglia, Letter, 26 FCC Rcd 12685 (MB 2011) (“*Mattoon*”).

⁵ *Mattoon*, 26 FCC Rcd at 12686.

resources of the applicant and the Commission in processing multiple applications, and resulting in the ‘efficient use of limited spectrum.’”⁶

3. We uphold the Bureau’s decision not to expand *Mattoon* to include the waiver of Section 74.1233(a)(1) to allow the proposed modification of an FM translator to rebroadcast a station in the FM (rather than the AM) service as a minor modification. We reject EMF’s untethered reading of the *Mattoon* waiver criteria, which explicitly included the requirement to rebroadcast an AM station. We agree with the Bureau that the AM/FM distinction was crucial to the outcome in *Mattoon* which was expressly based, in part, on the public interest goal of AM revitalization. The Commission’s 2009 deregulatory rule change⁷ to permit AM/FM translator rebroadcasting has been an “unqualified success.”⁸ That action, coming six years after the first FM translator window, instantly created a gap between the demand for FM translator licenses and supply. The AM “fill-in” restriction further exacerbated this problem.⁹ A further supply impediment, subsequently eliminated by the Commission,¹⁰ was that *Mattoon* waivers were initially limited to already-authorized translator stations.¹¹ None of these factors is relevant for NCE FM stations, such as EMF’s Station WKVU(FM) here, which for decades have had the ability to use new and existing FM translators to extend their signal distribution systems.¹²

4. We also agree with the Bureau that EMF has failed to identify any special circumstances in this case that would warrant a deviation from the general rule.¹³ Rather, grant of the Waiver Request, as EMF acknowledges, would affect not only EMF but “many other like-situated licensees.”¹⁴ Furthermore, the public interest benefits cited by EMF—the inherent public interest benefit in expanding noncommercial educational service and eliminating the resource-intensive processing of serial translator “hops” applications—are neither particularized nor compelling enough to warrant waiver. Not only could these arguments be asserted for any station in any service, but the Bureau has determined that the serial modification applications EMF warns of are not mere administrative inconveniences but rather disallowed as an abuse of process.¹⁵

5. In the Application for Review, EMF cites a number of waiver requests that likewise did not comply with the fourth criterion of *Mattoon*, because they involved modification of FM translator

⁶ Application for Review at 3.

⁷ See *Amendment of Service and Eligibility Rules for FM Broadcast Translator Stations*, Report and Order, 24 FCC Rcd 9642 (2009) (“*AM/FM Translator R&O*”).

⁸ See *Revitalization of the AM Radio Service*, Notice of Proposed Rulemaking, 28 FCC Rcd 15221, 15229 (2013) (“*AM Revitalization NPRM*”).

⁹ See *id.* at 15229.

¹⁰ See *Creation of a Low Power Radio Service*, Fourth Report and Order and Third Order on Reconsideration, 27 FCC Rcd 3364, 3395 (2012).

¹¹ See *AM/FM Translator R&O*, 24 FCC Rcd at 9650.

¹² In this case, the Media Bureau has identified numerous FM translator authorizations which would not require waivers to rebroadcast the signal of WKVU(FM). EMF does not discuss these rule-compliant alternatives.

¹³ *Reconsideration Decision*, 28 FCC Rcd at 14913, n.6; see *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).

¹⁴ Application for Review at 1.

¹⁵ See *Mattoon*, 26 FCC Rcd at 12687 (citing *Amendment of Sections 1.420 and 73.3584 of the Commission's Rules Concerning Abuses of the Commission's Processes*, Notice of Proposed Rulemaking, 2 FCC Rcd 5563 ¶ 2 (1987) (“We believe that ‘abuse of process’ may be characterized as any action designed or intended to manipulate or take improper advantage of a Commission process, procedure or rule in order to achieve a result which that process, procedure or rule was not designed or intended to achieve; or to subvert the underlying purpose of that process, procedure or rule.”). See also *AM Revitalization NPRM*, 28 FCC Rcd at 15226.

facilities to rebroadcast FM stations, but were nevertheless granted by Bureau staff. These grants were made in error and without written decisions during a period of high volume FM translator modification application filings. In 2013, the Bureau directed staff to cease granting such waivers, for the reasons noted in paragraph three, *supra*. However, as stated in the *Reconsideration Decision*, those grants are final and cannot be rescinded.¹⁶ It is well established, however, that erroneous staff actions do not bind the Commission.¹⁷

6. Upon review of the Application for Review and the entire record, we conclude that EMF has not demonstrated that the Bureau erred. The Bureau, in the *Reconsideration Decision*, properly decided the matters raised, and we uphold its decision for the reasons stated therein and in paragraphs three to five, *supra*.

7. ACCORDINGLY, IT IS ORDERED that, pursuant to Section 5(c)(5) of the Communications Act of 1934, as amended,¹⁸ and Section 1.115(g) of the Commission's rules,¹⁹ the Application for Review IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

¹⁶ *Reconsideration Decision*, 28 FCC Rcd at 14914.

¹⁷ *See, e.g., Comcast Corp. v. FCC*, 526 F.3d 763 (D.C. Cir. 2008) (Commission is not bound by staff actions granting allegedly inconsistent waivers if Commission has not endorsed those actions); *65 Applications for Authority to Construct and Operate Multipoint Distribution Service Stations at Three Transmitter Sites*, Memorandum Opinion and Order on Reconsideration, 10 FCC Rcd 11162, 11175 (1995) (erroneous and unexplained staff actions are not precedent that binds the Commission); *Birach Broadcasting Corporation*, Letter, 24 FCC Rcd 8945, 8951 (MB 2009) (same); *North Texas Media, Inc. v. FCC*, 778 F.2d 28, 33 (D.C. Cir. 1985) (“The initial improvident grant of a waiver in this case, now described as an error, does not deprive the agency of authority to require future applicants to meet certain standards in order to obtain such a waiver”).

¹⁸ 47 U.S.C. § 155(c)(5).

¹⁹ 47 C.F.R. § 1.115(g).