

**Mutually Contingent Applications**  
**and**  
**Compliance with Sections 73.3517, 73.3518, and 73.3520 of the Commission's Rules**

Through this application, Radio Station WPAY/WPFB, Inc. ("RSWW"), seeks to modify the facilities of Station WPAY-FM, Facility Id, No. 54813, to change the station's community of license from Portsmouth, Ohio, to New Boston, Ohio, and to operate with Class C0 directional facilities. No change in the WPAY-FM transmitter site is proposed. (WPAY-FM currently operates as a full Class C station utilizing a directional antenna.) This application (the "WPAY-FM 2009 Application") is mutually contingent with two other modification applications being filed today: (1) Station WNLT (FM), Facility Id. No. 69986, the licensee of which is Vernon L. Baldwin, Inc., seeks to specify a new transmitter site and to change its community of license from Harrison, Ohio, to Delphi Hills, Ohio; and (2) Station WORL, Facility Id. No. 38459, the licensee of which is Educational Media Foundation, seeks to change its community of license from Delphi Hills, Ohio, to Harrison, Ohio.

These three mutually contingent applications are being filed pursuant to Section 73.3517(e) of the Commission's Rules. The parties' agreement, dated March 30, 2009, with respect to the filing and prosecution of these applications is submitted herewith.

RSWW notes that it presently has pending before the Commission an application to modify the facilities of WPAY-FM to specify operation with Class C0 directional facilities from its present transmitter site (BPH-20070119ACD) ("the WPAY-FM 2007 Application"). That application does not contemplate a change in WPAY-FM's community of license. The WPAY-FM 2007 Application is mutually contingent with three other applications: (1) WODB (FM) (formerly WJKZ), Facility Id. No. 30563, the licensee of which is Franklin Communications, Inc. ("Franklin"), proposes to change its transmitter site and to change its community of license from Richwood, Ohio, to Grandview Heights, Ohio (BPH-20070119ACQ); (2) WQEL (FM), Facility Id. No. 7112, the licensee of which is also Franklin, proposes to change its community of license from Bucyrus, Ohio, to Richwood, Ohio (BPH-20070119ACQ); and (3) WCVO (FM), Facility Id. No. 11138, Gahanna, Ohio, proposes to change its transmitter site and otherwise modify its facilities.

For purposes of this discussion, the WODB, WQEL and WCVO applications together with the 2007 WPAY-FM Application will be referred to as Group 1, while the WNLT and WORL applications together the WPAY-FM 2009 Application will be referred to as Group 2.

For the reasons discussed below, the simultaneous prosecution of the WPAY-FM 2007 Application and the WPAY-FM 2009 Application does not contravene the Commission's rules, including specifically, Sections 73.3517, 73.3518 and 73.3520.

### **73.3517 - Contingent Applications**

Under Section 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.”

Group 1 consists of four contingently related applications, while Group 2 includes three. None of the applications filed in Group 1 are contingently related to Group 2, and vice versa.

Therefore, the two groups are entirely separate and distinct application groups, both within the limits set forth by 73.3517(e).

### **73.3518 - Inconsistent or Conflicting Applications**

The WPAY-FM 2007 Application and the WPAY-FM 2009 Application are not inconsistent or conflicting. The WPAY-FM 2007 Application (which should be processed first under the Commission’s FM Processing Guidelines)<sup>1</sup> does not conflict in any way with the WPAY-FM 2009 Application in Group 2, which seeks to change the community of license to New Boston. The protections afforded WODB in the WPAY-FM 2007 Application are present in the directional pattern proposed in the WPAY-FM 2009 Application. The grant of the Group 1 applications will not conflict with the grant of the Group 2 applications.

### **73.3520 - Multiple Applications**

Under this rule, “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.” In this case, the WPAY-FM 2009 Application is not being filed to serve the same community. The WPAY-FM 2009 Application proposes service to a different community, New Boston, through a community of license change. Section 73.3520 and Commission precedent holds that the rule does not apply to applications to serve different communities. *See, e.g.,* Dennis J. Kelly, Esq., re: KWFA(AM) , Tye, Texas, 23 FCC Rcd 4786, n. 5 (MB 2008)

One recent Commission decision is particularly instructive concerning WPAY-FM’s compliance with all three rules. The circumstances present in *Siga Broadcasting Corporation*, 23 FCC Rcd 1823 (MB 2008), parallel WPAY-FM’s situation in Groups 1 and 2. In *Siga*, the Commission determined that no violation of its rules occurred where a community of license change

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<sup>1</sup> Under Section 73.3573(f) of the Commission’s rules, applications for minor modifications of non-reserved FM broadcast stations should be “processed in the order in which they are tendered.”

application was filed while a minor change application was pending, since both applications could be effectuated and concerned service in different communities:

[T]he filing of a minor change application proposing a change in a station's technical facilities does not preclude a licensee from later filing a major change application proposing a new community of license, even if the minor change application has not yet been granted. No Commission rule or policy prevents a licensee from completing the proposed minor change and then implementing the proposed major change, should both be granted.

*Id.* at 1824. At the time in question, a change in a station's community of license was considered a "major" change. Now a community of license change is deemed a minor modification. See Section 73.3573(g). But Section 73.3520 makes no distinction between major and minor modifications. Thus, the reading of Section 73.3520 upon which in *Siga* and *Kelly* rest remains applicable.

#### **If Necessary, Waiver(s) Requested**

While it is the view of RSWW that the filing of this application does not violate Section 73.3517, 73.3518, or 73.3520 of the Commission's rules, should the Commission determine that this application requires waiver of any of the above-referenced rules, or any other FCC procedural rule or staff application-processing policy, the applicant respectfully requests such a waiver or waivers.

The Commission has the discretion to grant waivers of its rules where special circumstances warrant deviation from the general rules, such as when the deviation will benefit the public interest.<sup>2</sup> Because the grant of both Group 1 and Group 2 will streamline and expedite the Commission's processing of applications in both groups, resulting in significant public service benefits, such circumstances are present here.

The rules concerning inconsistent, conflicting and multiple applications are vital tools through which the Commission can prevent applicants from flooding the Commission's resources with multiple applications, many of which could not be granted. The rule is long-established as a

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<sup>2</sup> See *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (citing *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969).

method to prevent the abuse of FCC process.<sup>3</sup> This case presents the flip side of that concern. Application of the rules to prevent the processing of this application group would hinder the streamlining of the process and the conservation of the Commission's resources. Processing this group of contingent applications will expedite significant benefits to the public (providing New Boston its second local transmission service.

As such, to the extent that the Commission deems a waiver or waivers to be necessary, it is respectfully requested that such waivers are granted to facilitate the public interest benefits that will result from the expeditious processing of the applications.

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<sup>3</sup> See *Jersey Shore Broadcasting Corp. v. FCC*, 37 F.3d 1531, 1537 (D.C. Cir. 1994) (citing *Storer Broadcasting Co.*, 43 FCC 1254, 1256 (1953).