

Waiver Request

In order to process and approve the instant minor change application, and pursuant to Section 1.3 of the Commission's rules, Western New Life, Inc. ("Western New Life"), licensee of Station WQHA, Aguada, Puerto Rico, hereby requests waiver of the Media Bureau's 2013 freeze on the filing and processing of minor modification applications.¹ As set forth, there is good cause to grant a waiver to WQHA, and it will serve the public interest.

In the *April 2013 Freeze Public Notice*, the Bureau explained that the freeze was required (1) to create a stable database of full power and Class A facilities that would allow for the development and analysis of potential repacking methodologies to be used in connection with the Incentive Auction authorized by the Spectrum Act; and (2) to avoid further expansion of broadcast television stations' use of spectrum.² The *April 2013 Freeze Public Notice* explained that the Bureau would consider, on a case-by-case basis, requests for waivers of the filing limitations when a modification application was necessary or otherwise in the public interest for technical or other reasons to maintain quality service to the public.³

In late 2017, the Media Bureau temporarily lifted for a week the April 2013 freeze to full power and Class A stations.⁴ The Bureau reasoned that temporarily lifting the freeze would permit full power and Class A television stations that were not assigned a new channel in connection with the incentive auction to file minor modification applications proposing facilities to change their contours.⁵ The freeze was lifted on November 28 and reimposed on December 7,

¹ See *Media Bureau Announces Limitations on the Filing and Processing of Full Power and Class A Television Station Modification Application, Effective Immediately, and Reminds Stations of Spectrum Act Preservation Mandate Public Notice*, 28 FCC Rcd 4364 (MB 2013) ("*April 2013 Freeze Public Notice*").

² *Id.* at 4364-65.

³ *Id.* at 4365.

⁴ *Freeze on the Filing of Minor Modification Applications to Be Lifted Temporarily to Permit Filing of Applications to Expand the Contours of Full Power and Class A Television Stations that Are Not Part of the Post-Incentive Auction Repack Process Public Notice*, 32 FCC Rcd 7643 (MB 2017).

⁵ *Id.* at 7644.

2017.⁶ However, the freeze was of little assistance to Western New Life as WQHA was required to change channels as part of the repack process.

Also, more importantly, the lifting of the filing freeze for barely a week in late November and early December 2017 came almost immediately after Puerto Rico was visited upon by two category five storms in September 2017, Hurricanes Irma and Maria, that devastated the island and destroyed the WQHA tower (breaking the tower in two) and its site and left Puerto Rico without electricity for several months, rendering WQHA unable to broadcast for a lengthy period. When the FCC temporarily lifted the filing freeze, the licensee and Station WQHA were in pure survival mode with no power, telephone service or Internet service. The licensee and its owners were not even aware of the temporary lifting of the filing freeze.

Under Section 1.3 of the Commission's rules, "[a]ny provision of the rules may be waived by the Commission on its own motion or on petition if good cause therefore is shown."⁷ "Good cause" exists if "special circumstances warrant a deviation from the general rule and such deviation will serve the public interest" better than adherence to the general rule.⁸

The FCC may exercise its discretion to waive a rule where particular facts make strict compliance inconsistent with the public interest.⁹ In deciding whether waiver is appropriate, the Commission should consider that "a rule is more likely to be undercut if it does not take into account considerations of hardship, equity or more effective implementation of overall policy on

⁶ *Media Bureau Temporarily Lifts the Freeze on the Filing of Modification Applications that Expand the Contour of Full Power and Class A Television Stations from November 28 through December 7, 2017*, 32 FCC Rcd 9328 (MB 2017).

⁷ 47 C.F.R. Section 1.3.

⁸ *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990). See also *Network IP, LLC v. FCC*, 548 F.3d 116, 127 (D.C. Cir. 2008).

⁹ *WAIT Radio v. FCC*, 418 F.2d 1153, 1157-59 (D.C. Cir. 1968). See also *Northeast Cellular Telephone*, 897 F.2d at 1166.

an individual basis, considerations that an agency cannot realistically ignore.”¹⁰ To make the public interest determination, the waiver cannot undermine the purpose of the rule, and there must be a stronger public interest benefit in granting the waiver than in applying the rule.¹¹

Grant of the requested waiver here is warranted under all of these standards. Strict adherence to the freeze would punish WQHA for being a Puerto Rican television station, having suffered a complete loss of service for the better part of a year, which made it impossible for it to file an application to modify its facilities during the one-week temporary lifting of the freeze.

Additionally, waiver of the April 2013 freeze policy would not undermine the purpose of the freeze -- to create a stable database of full power and Class A facilities that would allow for development and analysis of potential repacking methodologies. The database of full power and Class A stations is now stable. The repack process and the DTV transition is complete. The post-incentive auction transition period is complete. Acceptance of the Station WQHA Minor Change Application will not adversely affect that reality.¹² The Commission should not restrict access to an expanded facility by WQHA, which although technically in violation of the freeze, would not undermine the purpose which the freeze was designed to further. Given the horrible financial and technical impact caused by twin disasters to WQHA, the station has endured special, once in a century, circumstances warranting a deviation from the general freeze policy as to this station, so

¹⁰ *WAIT Radio*, 418 F.2d at 1159.

¹¹ *Northeast Cellular*, 897 F.2d at 1166; *WAIT Radio*, 418 F.2d at 1157.

¹² Within the last few days, on October 29, 2020, the Media Bureau released a *Public Notice*, DA 20-1269, lifting the 2013 freeze on the filing of television station minor modification applications in the future. The freeze is to be lifted fifteen (15) days after publication of the *Public Notice* in the Federal Register. The Media Bureau should, nonetheless, grant this Waiver Request and should immediately review the instant WQHA Application. While, potentially, the ability to file such an Application may occur shortly, there is no way of being certain when this will occur, since Federal Register publication is not typically an immediate event. Moreover, the equities in favor of accepting and reviewing the WQHA Application do not disappear because the freeze will be lifted sometime in the near future. There is abundant good cause present here for granting the requested waiver to Western New Life and reviewing the WQHA Application immediately rather than waiting until some date in the future.

it may better serve the public interest. The FCC should consider the hardship endured by WQHA and Western New Life. The station was materially adversely affected, through no fault of its own, and those adverse effects continue until this day, as WQHA cannot effectively compete against other Puerto Rican television stations which have expanded contours and serve far larger service areas and populations. Review and approval of the instant Application will permit WQHA to expand its service to over 2 million viewers, eliminating its current competitive disadvantage.

Grant of the Application will not cause harmful interference to other television stations. The public will not be harmed by consideration and approval of the Application. Instead, grant of the waiver will increase quality service to the public. Western New Life respectfully requests waiver of the Media Bureau's freeze policy. Waiver is appropriate in this situation and is necessary to serve the public interest. There is good cause for the waiver, it is needed by Western New Life and WQHA, it will not harm the waiver policy announced in 2013 and it should be granted.