

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)
)
Application of Educational Media Foundation) File No. BPFT-20130416AAG
W267AT, Oneonta, New York)
)

To: Chief, Media Bureau

PETITION FOR RECONSIDERATION

Educational Media Foundation (“EMF”), licensee of the W267AT, by its attorneys, hereby petitions the Media Bureau to reconsider the dismissal of the above-referenced application (the “Application”) for a change in the facilities of this translator. EMF is a noncommercial educational entity (“NCE”) that is the licensee of hundreds of operating FM translators and full power stations across the country. As the licensee of many translators providing a noncommercial broadcast service to listeners nationwide, being able to make changes to the facilities of its stations in the most efficient manner possible, in a manner so as to best serve the public interest, is of crucial importance. EMF believes that the dismissal of this application, and the policy position that it represents, is contrary to the public interest and will be injurious to many similarly situated applicants. Thus, it should be reversed. In addition, EMF believes that this decision represents a change in policy in the Commission's administration of "Mattoon" waivers that should not be adopted without a clear explanation of the reasons for its departure from its prior processing policies.

EMF filed the Application on April 16, 2103, seeking to relocate the transmitter site for W267AT. The application was filed as a minor modification, notwithstanding the lack of

overlap between the existing and proposed 60 dbu contours of the station. A request for a waiver of Section 74.1233(a)(1) of the Commission's rules was included in the application, seeking to have the application treated as a minor change notwithstanding the lack of 60 dbu overlap. While Section 74.1233(a)(1) provides that any change in a translator's antenna location where the proposed 60 dBu protected contour would not continue to cover some portion of its previously authorized 60 dBu protected contour will be processed as a major change, this rule has been waived routinely in dozens if not hundreds of cases since the Bureau's decision in *The Cromwell Group, Inc. of Illinois*, where it adopted what has become known in the industry as the "Mattoon waiver."¹

In *Cromwell*, the applicant asked that it be granted a waiver of Section 74.1233(a)(1) so that it could relocate a translator through the use of a minor change application, so long as the protected and interfering contours of the present and proposed sites overlapped, rather than requiring that their actual protected service areas overlap. The applicant argued that this process was more efficient, as it did not require the processing of multiple applications, and the construction of multiple transmitter sites for the translator, to accomplish a move of a translator to an area where it could best serve the public interest. Moreover, as interference would be predicted to exist between the existing and proposed facilities, the move would not implicate *Ashbacker*,² as no other applicant could operate a station at the site proposed by the new application.

The Bureau agreed with the applicant, granted its waiver request and processed it application as a minor change. As the decision involved a translator in Mattoon, Illinois, the

¹ *The Cromwell Group Inc. of Illinois*, Letter from Peter H. Doyle, Chief, Audio Division, Media Bureau, FCC, to John F. Garziglia, Esq., Womble Carlyle Sandridge and Rice, PLLC, 26 FCC Rcd 12685 (dated Sept. 2, 2011) ("*Cromwell*").

² *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327 (1945).

policy established in the case has come to be known in the industry as the Mattoon waiver policy. To qualify for the waiver, the decision stated that an applicant must meet the following criteria: (1) it cannot have a history of filing “serial” minor modification applications; (2) the proposed facility must be mutually-exclusive to its licensed facility; (3) the proposed move cannot implicate the concerns raised by the Commission in the recent orders in the low power FM (“LPFM”) docket³ and; (4) the move would serve the public interest which, in *Cromwell*, was the rebroadcast of an AM station.⁴ In many cases decided since the *Cromwell* case, the Commission has applied this policy to translators proposing to rebroadcast FM stations, demonstrating that the fourth criteria was not confined to situations where the translator would rebroadcast an AM station.⁵

In connection with its Application, EMF included a waiver request setting forth how it met each of the criteria. There have been no questions raised as to EMF's compliance with the first three criteria. As for the fourth, as EMF was not proposing the rebroadcast of an AM station, it instead demonstrated that the public interest benefit of the grant of this application would be in many ways like the benefits enjoyed by the applicant in *Cromwell*, saving resources of the applicant and the Commission in processing multiple applications, and resulting in the “efficient use of limited spectrum.”⁶ Nevertheless, the application was denied. In its letter denying the application, the Bureau stated that the Mattoon waiver was meant to apply solely to

³ See *Creation of a Low Power Radio Service*, Third Further Notice of Proposed Rule Making, 26 FCC Rcd 9986 (2011); *Creation of a Low Power Radio Service*, Fourth Report and Order and Third Order on Reconsideration, 27 FCC Rcd 3364 (2012).

⁴ *Cromwell*, 26 FCC Rcd at 12686; *Perry Broadcasting Company, Inc.*, Letter from Peter H. Doyle, Chief, Audio Division, Media Bureau, FCC, to Russell M. Perry, Perry Publishing and Broadcasting Company, Inc., 27 FCC Rcd 5955, 5956 (dated June 1, 2012).

⁵ See FCC, CDBS Public Access, *Woman’s World Broadcasting, Inc.*, W296BB (Application Search, FCC File No. 20130411ACR); FCC, CDBS Public Access, *Calvary Chapel of Costa Mesa, Inc.*, K245AI (Application Search, FCC File No. 20130326AGG).

⁶ See *Cromwell*, 26 FCC Rcd at 12689.

“fill-in” translators.⁷ As the EMF proposal was not for a fill-in translator, but instead sought to expand the reach of its noncommercial broadcast programming (as specifically permitted under the Commission's rules), the application was rejected.

In *Cromwell*, there is no specific requirement that the translator be a “fill-in” in order for it to be considered under the criteria established in the case. At most, the Bureau found that the fact that the application was proposing a fill-in service for an AM station was a factor to be considered favorably in the evaluation of the waiver. Yet it also said that this factor alone was not sufficient for a waiver. Since the establishment of the Mattoon waiver in the *Cromwell* case, the Bureau has processed applications using the criteria established in the case, with applications being granted that did not involve fill-in service for an AM station. It is unclear where the requirement that the Mattoon waivers apply only to fill-in translators arose. EMF submits that, wherever it arose, it does not serve the public interest.

The purpose of the Mattoon waiver is to permit translators to be moved to locations where they can be used most efficiently without having to file multiple applications and to construct at multiple transmitter sites. While, without the waiver, licensees still have a path to relocating a translator to a desired site via a series of minor modifications, that path is an incredibly inefficient path that would take up additional Commission resources to process numerous applications. In addition, it is a drain on a licensee’s resources in obtaining a site lease at multiple locations, building and operating the station at each of the hops, and in preparing and filing each of the applications. The very reason for the Mattoon waiver is to eliminate all of these unnecessary hurdles.

⁷ Letter from James D. Bradshaw, Deputy Chief, Audio Division, Media Bureau, to Educational Media Foundation, at 1 (dated June 10, 2013) (re: W267AT, Oneonta, NY FCC File No. BPFT-20130416AAG).

In the case of W267AT, it would take three moves to accomplish the desired result, meaning the Commission staff would be required to process three separate applications as opposed to one, and two unnecessary sites would have to be built out and operated while the applicant waited to move to the site where it believes there is the most demand for its programming. Denying it the use of the Mattoon waiver is establishing a precedent that will penalize NCE operators - a group of broadcasters that the FCC has long recognized should be allowed to take advantage of financial savings wherever possible. The FCC has many times recognized that noncommercial broadcasters, whose principal funding comes directly from their listeners' donations, are often limited in their resources. For this reason, in many cases, the FCC has exempted NCE stations from regulatory burdens that could impose additional costs on these stations, or it has minimized their regulatory burdens knowing that the costs may prove difficult for the noncommercial broadcaster to meet. Denying NCE operators the use of the Mattoon waiver in trying to relocate translators to sites at which they will best serve the public will unnecessarily impose costs on these operators.

The distance between the licensed site and the proposed site for W267AT is a mere 36 kilometers. But the terms of the Mattoon waiver, the move does not preclude other applicants the use of the proposed site in a manner that offends *Ashbacker*, as the site cannot be used without creating interference to the translator's existing licensed site. Nevertheless, for this short move in an effort to expand its service, EMF would be required to enter into a lease agreement with a tower owner for three separate sites. It would then be required to prepare and prosecute three separate applications at the Commission, and to construct and operate the facilities at each of these sites. This is hardly an efficient use of resources for a noncommercial broadcaster - or for the Commission.

The Bureau dismissed the Application because the proposed facility is not a fill-in to an AM or FM station.⁸ A noncommercial broadcast licensee is permitted to own and operate an FM translator that is not a fill-in, so as to be able to expand its noncommercial service beyond the protected contours of its primary station. By adopting rules to permit this expansion of noncommercial service, the Commission has deemed such service to be in the public interest. This use of non-fill-in translators is, for the most part, unique to noncommercial broadcasters. The public interest benefit of providing the expanded noncommercial educational broadcasting service offered by EMF is of no lesser consequence than the service that is provided by a fill-in station. Allowing this expanded NCE service to be provided in the least complicated manner though the use of a Mattoon waiver should not be disfavored. The decision dismissing the application made no reference to any public interest harm that is caused by such a waiver – and the benefits to the applicant and to the Commission are identical as those enjoyed by a fill-in translator.

The Commission may grant a waiver of a rule where particular facts make strict compliance inconsistent with the public interest.⁹ The narrowly-tailored facts presented in the Application, and the efficient use of the resources of both the Commission of the noncommercial broadcaster, make for a compelling public interest case at least as compelling as that provided in *Cromwell*. These public interest factors demand equal consideration, and the allowance of the use of the Mattoon waiver in this instance.

⁸ *Id.* at 1.

⁹ *Northeast Cellular Telephone Co., L.P. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990).

As set forth above, the dismissal of the Application does not serve the public interest. Thus, EMF respectfully asks that the Commission reconsider the dismissal of the Application, apply the Mattoon waiver to this situation, and grant the Application.

Respectfully submitted,

EDUCATIONAL MEDIA FOUNDATION

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