



Federal Communications Commission
Washington, D.C. 20554

May 23, 2019

In Reply Refer to:
1800B3-SS

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In re: **New(FX), Gallatin, TN**
Facility ID No. 202604

File Nos. BNPFT-20180129AEA
BNPFT-20180508ACN

Petition to Deny

Dear Counsel:

This letter concerns: (1) the referenced application (Second Application) of Brayden Madison Broadcasting, LLC (BMB) for a construction permit for a new FM translator station on Channel 300 at Gallatin, Tennessee;¹ (2) a Petition to Deny (Petition) the Second Application, filed on May 24, 2018, by Saga Communications of Tuckesse, LLC (Saga);² and (3) a related responsive pleading.³ For the reasons set forth below, we deny the Petition, and we grant the Second Application.

Background. BMB filed for a new FM Translator station at Gallatin during the filing window in January of 2018.⁴ BMB's proposal was determined to be a "singleton," and it was invited to file a long-

¹ The proposed translator is a fill-in for Station WHIN(AM), Gallatin, Tennessee (WHIN).

² Saga is licensee of co-channel Station WCVQ(FM), Fort Campbell, Kentucky.

³ BMB filed an Opposition to Petition to Deny (Opposition) on June 8, 2018.

⁴ Application File No. BNPFT-20180129AEA (Second Application Short-Form Filing). The Second Application contains a request for waiver (*see* Second Application Short-Form Filing, Exhibit 1) of the prohibition against filing an application in the second FM translator filing window (Auction 100), if the applicant had already filed an application in the previous filing window (Auction 99). *See Filing Instructions for Second Cross-Service FM Translator Auction Filing Window for AM Broadcasters (Auction 100) to be Open January 25 — January 31, 2018, Freeze on FM Translator and Low-Power FM Minor Change Applications and FM Booster Applications January 18 - January 31, 2018*, Public Notice, 32 FCC Rcd 10173, 10175, para. 5 (MB/WTB Dec. 4, 2017) (*Auction 100 Public Notice*) (AM station licensees or permittees that have already applied for a cross-service FM translator in either the 2016 modification windows or 2017 new cross-service FM translator auction filing window are not eligible to apply in the Auction 100 filing window). BMB had filed an application (BNPFT-20171201AFK) (First Application), which was contested, during the Auction 99 filing window for Channel 228 for which it sought dismissal on March 8, 2018.

form application,⁵ which it did on May 8, 2018. The staff accepted the Second Application for filing on May 9, 2018.⁶ BMB filed an amendment on June 8, 2018, proposing a different directional antenna.⁷

In its Petition, Saga argues that BMB violated the filing procedures established by the Commission for Auction 100 because BMB filed its First Application in a previous filing window and that BMB's request for waiver is "insufficient."⁸ Specifically, Saga argues that BMB is attempting to "game" the system by garnering a better channel; *i.e.*, Saga claims that once BMB "was confident" that it had a singleton for Channel 300, rather than amend its First Application for Channel 228, which Saga claims BMB could have amended and maintained, it sought dismissal of that application and filed the Second Application.⁹ In addition, Saga asserts that BMB's waiver request does not meet the "hard look" test required for the grant of a waiver in this situation.¹⁰ Finally, Saga argues that BMB's proposed translator will interfere with the established listening audience of Saga's WCVQ(FM), Fort Campbell, Kentucky, in violation of Section 74.1204(f) of the FCC's rules (Rules) and that the Application should be dismissed.¹¹

In its Opposition, BMB initially states that it has resolved the potential interference issue articulated in the Petition and has amended the Second Application.¹² Next, BMB argues that its waiver request should be granted based on the staff's recent *Edward A. Schober, PE*, decision.¹³ BMB asserts that, in *Schober*, the staff stated that it would consider requests for waiver of the eligibility criteria which limit an AM licensee to participation in one of the four modification or new translator filing windows on a showing of "good cause," when the facts of a particular case make strict compliance with a rule inconsistent with the public interest and when the relief requested would not undermine the policy objective of the rule in question.¹⁴ Here, BMB claims that there is ample good cause for the staff to grant its waiver request in that, because of the petition to deny, it was "highly unlikely" that the contested First Application would have been granted, and if BMB's amended Second Application is banned from the Auction 100 filing window, then BMB nor the public would be afforded the benefits intended by the Commission's AM revitalization efforts.¹⁵

Discussion. Pursuant to Section 309(d) of the Communications Act of 1934, as amended (Act),¹⁶ a petition to deny must provide properly supported allegations of fact that, if true, establish a substantial and material question of fact that granting the application would be *prima facie* inconsistent with the

⁵ See *Media Bureau Announces Auction 100 FM Translator Filing Window for Long-Form Applications*, Public Notice, 33 FCC Rcd 2276, 2277 (MB 2018) (*Auction 100 Singleton List*).

⁶ See *Broadcast Actions*, Public Notice, Report No. 29235 (rel. May 14, 2018).

⁷ See Second Application, as amended, at Exhibit 1.

⁸ Petition at 2.

⁹ *Id.* at 3-4.

¹⁰ *Id.* at 4.

¹¹ *Id.* at 4-5; see also engineering submission of Asher Broadcast Consulting, LLC (Saga Engineering Submission) at Attachment; see also 47 CFR § 74.1204(f).

¹² Opposition at 2; see also Second Application, as amended, at Exhibit 1.

¹³ *Id.* at 2, citing *Edward A. Schober, PE*, Letter Order, 33 FCC Rcd 145 (MB 2018) (*Schober*).

¹⁴ *Id.*

¹⁵ *Id.* at 3, citing *Revitalization of the AM Radio Service*, First Report and Order, Further Notice of Proposed Rule Making, and Notice of Inquiry, 30 FCC Rcd 12145, para. 1 (2015) (*AM Revitalization First R&O*) (purpose of cross-service FM translator windows is to "assist AM broadcasters to better serve the public").

¹⁶ See 47 U.S.C. § 309(d).

public interest, convenience, and necessity.¹⁷ Additionally, when an applicant seeks waiver of a rule, it must plead with particularity the facts and circumstances which warrant such action.¹⁸ The Commission must give waiver requests a “hard look,” but an applicant for waiver “faces a high hurdle even at the starting gate”¹⁹ and must support its waiver request with a compelling showing.²⁰ Waiver is appropriate only if both (1) special circumstances warrant a deviation from the general rule, and (2) such deviation better serves the public interest.²¹

Waiver Request. Eligibility to apply in the 2017 (Auction 99) and 2018 (Auction 100) auction filing windows for new cross-service FM translator stations was defined by the Commission in the *AM Revitalization First R&O*. The Commission clearly stated that any applicant that participated in previous filing windows would be ineligible to file in subsequent auction windows, and further defined participation as filing an application.²² Because neither BMB nor any other party sought reconsideration of the *AM Revitalization First R&O* as to this issue, the Bureau has held that the eligibility criteria established by the Commission in the *AM Revitalization First R&O* were implemented correctly by the Bureaus for Auction 99,²³ and we find them similarly applicable in Auction 100.

We will, however, consider requests for waiver of the eligibility requirement on a showing of good cause, when the facts of a particular case make strict compliance with a rule inconsistent with the public interest if applied to the applicant and when the relief requested would not undermine the policy objective of the rule in question. Thus, applicants that participated in prior FM translator modification windows or the first auction window that believe they can make the requisite compelling waiver showing to justify their eligibility for a later auction window may do so, as BMB alleges here, and will receive the requisite “hard look.”²⁴

¹⁷ See, e.g., *WWOR-TV, Inc.*, Memorandum Opinion and Order, 6 FCC Rcd 193, 197 n.10 (1990), *aff'd sub nom. Garden State Broad. L.P. v. FCC*, 996 F.2d 386 (D.C. Cir. 1993), *rehearing denied* (Sept. 10, 1993); *Area Christian Television, Inc.*, Memorandum Opinion and Order, 60 RR 2d 862, 864 (1986) (petitions to deny must contain adequate and specific factual allegations sufficient to warrant the relief requested).

¹⁸ *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969) (*WAIT Radio*). In granting a waiver, the Commission must both explain why deviation from the rule better serves the public interest than strict application of the rule and must articulate the nature of the special circumstances to prevent discriminatory application and to put future parties on notice as to its operation.

¹⁹ *Id.*

²⁰ *Greater Media Radio Co., Inc.*, Memorandum Opinion and Order, 15 FCC Rcd 7090 (1999) (citing *Stoner Broad. System, Inc.*, Memorandum Opinion and Order, 49 FCC 2d 1011, 1012 (1974)).

²¹ *NetworkIP, LLC v. FCC*, 548 F.3d 116, 125-128 (D.C. Cir. 2008) (citing *Northeast Cellular Telephone Co.*, 897 F.2d 1164, 1166 (1990)). The Media and Wireless Telecommunications Bureaus (Bureaus) have received applications from otherwise ineligible applicants that concurrently requested waiver of the prohibition against prior window participants applying in a new FM translator auction window. See *Schober*, 33 FCC Rcd 145, n.11.

²² *AM Revitalization First R & O*, 30 FCC Rcd at 12153, para. 17. The Bureau reiterated this eligibility requirement with respect to Auction 99, see *Filing Instructions for Cross-Service FM Translator Auction Filing Window for AM Broadcasters to be Open July 26 –August 2, 2017*, Public Notice, 32 FCC Rcd 4663, 4665 (MB/WTB 2017) (“A second cross-service FM translator auction filing window, which will be open to any AM broadcast licensee or permittee that did not participate in either of the modification windows or in this filing window, will be announced at a later date.”), and in the *Auction 100 Public Notice*, 32 FCC Rcd at 10174 (“This filing window will be open to any AM station licensee that did not participate in either of the 2016 FM translator modification windows or the 2017 cross-service FM translator auction filing window, including licensees and proposed assignees of Class A and B AM broadcast stations that did not participate in a 2016 modification window.”).

²³ See, e.g., *Schober*, 33 FCC Rcd at 145.

²⁴ See *id.*, at 144-45, citing *WAIT Radio*, 418 F.2d at 1157.

BMB claims in its waiver request that its situation -- where a petition to deny alleges that an application is not grantable because it would violate Section 73.1204(f) of the Rules -- is one of the "enumerated examples" in *Schober* where a waiver of the eligibility criterion would be granted.²⁵ It also argues that the underlying purpose of the Commission's cross-service FM translator windows is to "assist AM broadcasters to better serve the public" through the AM revitalization efforts and that if BMB's First Window Application is not grantable and BMB is unable to participate in this second filing window, neither BMB nor the public would be afforded the benefit intended by these AM revitalization efforts.²⁶

Initially, we note that the "enumerated examples" cited by BMB are, in fact, petitioner *Schober's* proposed instances -- not the Commission's grounds -- for when a waiver should be granted.²⁷ Nevertheless, the Bureau in *Schober* also indicated that it would entertain requests for waiver from applicants that could make a compelling waiver showing.²⁸ In practical terms, we are amenable to waiving the "one application per AM station" limitation when: (1) the applicant will end up with only one FM translator authorization; and (2) doing so does not adversely impact any other applicant or licensee in any way. In a prior decision, the Bureau declined to waive the requirement where an applicant designated an AM primary station in its first modification window application, received a construction permit, subsequently surrendered that permit, and an affiliated applicant re-designated the same AM primary station in its Auction 100 application. There, the Bureau denied the waiver because the applicant violated the proscription on designating the same AM primary station in a second application that had already been designated in a construction permit obtained via a modification window.²⁹ Moreover, the Bureau could not say whether other potential AM licensees might have modified their own participation in the process -- by, for example, re-tailoring their engineering specifications or choosing another channel to avoid mutual exclusivity -- had they known that the applicant would be allowed to surrender its construction permit to try again in a later auction window to obtain a translator to re-broadcast the specified AM station.³⁰ Here, WHIN has not been designated as the primary AM station on any construction permit awarded in an *AM Revitalization* modification or auction window, and, in fact, BMB requested dismissal of the First Application prior to the release of the "singleton" list for Auction 100 applications. Moreover, the First Application was itself a "singleton" in Auction 99. There is thus no reasonable likelihood that any other applicant or licensee would have taken action in detrimental reliance on the First Application, and there is no preclusive impact in this case; *i.e.*, no processing of an application that is mutually exclusive with another application filed by an applicant that abided by the one-translator-per-AM primary criterion mandated in the *Auction 100 Public Notice*.³¹ BMB's rights to the First Application were extinguished by the time the staff processed the Second Application; therefore, with only the amended Second Application accepted for filing, there could be no attempt by BMB, as Saga alleges, to secure the better of two options.

Accordingly, because BMB will receive only one authorization and its actions here have not adversely impacted any other applicant or licensee, we find that "special circumstances" exist that will further the public interest in AM revitalization. We therefore will grant BMB's waiver request.

²⁵ See BNPFT-20181229AEA at Attachment 1 (Waiver Request), page 1, Opposition to Petition to Deny at 3.

²⁶ *Id.*

²⁷ See *Schober*, 33 FCC Rcd 145 at n.10.

²⁸ *Id.*, 33 FCC Rcd at 146.

²⁹ See, e.g., *Chesapeake-Portsmouth Broad. Corp.*, Letter Order, 2019 WL 1111320, DA 19-160, at 4 (MB rel. Mar. 8, 2019) (*Chesapeake*).

³⁰ *Id.* at 4.

³¹ *Id.*

Harmful Interference. In this case, the Petition must establish a substantial and material question of fact that grant of the Second Application would be inconsistent with Section 74.1204(f) of the Rules and meet the Commission's application filing requirements. In promulgating Section 74.1204(f) of the Rules, the Commission stated that it "will not grant an application if an objecting party provides convincing evidence that the proposed translator station would be likely to interfere with the reception of a regularly received off-the-air existing service, even if there is no predicted overlap."³² Under Section 74.1204(f), in order to provide "convincing evidence" that grant of an FM translator construction permit application "will result in interference to the reception" of an existing station, an opponent must provide, at a minimum: (1) the name and specific address of each potentially affected listener; (2) some demonstration that the address of each purported listener falls within the 60 dB μ service contour of the proposed translator station;³³ (3) a declaration from each of the affected listeners that he or she listens to the station at the specified location; and (4) some evidence that grant of the authorization will result in interference to the reception of the "desired" station at that location.³⁴ The Commission has stated that "[t]he best method, of course, is to plot the specific addresses on a map depicting the translator station's 60 dB μ contour."³⁵

Here, Saga has followed the required protocol by submitting documentation from six unaffiliated listeners certifying that they regularly listen to WCVQ(FM) at their homes or in their cars. By plotting the complainants' specific addresses and commuting routes on a map depicting the proposed translator's 60 dB μ contour, Saga has demonstrated that at least three complainants listen in their homes and three more listen to WCVQ(FM) on their commuting routes within the proposed translator's 60 dB μ contour. By virtue of its Exhibit utilizing the U/D signal ratio, Saga provides evidence that the proposed translator will result in interference to at least half of the six complainants at the listed locations (*i.e.*, Tyrone Robinson and Brittany and Eric Hansen).³⁶ We therefore find that Saga has adequately substantiated its Section 74.1204(f) claim against the original Second Application.

Nevertheless, our staff engineers have determined that the Second Application, as amended, has resolved all Section 74.1204(f) issues and that the proposed 60dB μ contour does not encompass any of the six complainants' listening areas.

Conclusion/Actions. We have examined the Second Application and find that, with the exception of the requirement waived above, it complies with all pertinent legal and technical requirements and that its grant would further the public interest, convenience, and necessity.

Accordingly, for the reasons set forth above, IT IS ORDERED, that the Petition to Deny filed by Saga Communications of Tuckessee, LLC, on May 24, 2018, IS DENIED.

³² See *Ass'n for Cmty. Education, Inc.*, Memorandum Opinion and Order, 19 FCC Rcd 12682, 12685-6, paras. 7-9 (2004) (*Association*), citing *Amendment of Part 74 of the Commission's Rules Concerning FM Translator Stations*, 5 FCC Rcd 7212, 7230 (1990), *modified*, 6 FCC Rcd 2334 (1991), *recon. denied*, 8 FCC Rcd 5093 (1993).

³³ The staff generally requires demonstrations of actual or potential interference from listeners within the translator station's proposed 60 dB μ contour who are unconnected with the full-service station whose service allegedly will be disrupted. See *Association*, 19 FCC Rcd at 12688 n.37 (approving staff practice requiring that the complainant be "disinterested.").

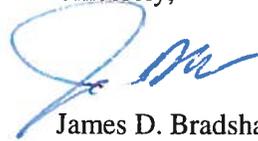
³⁴ *Id.*, 19 FCC Rcd at 12687.

³⁵ *Id.*

³⁶ See Saga Engineering Submission, pages 5-7.

IT IS FURTHER ORDERED, that the January 29, 2018, Waiver Request filed by Brayden Madison Broadcasting, LLC, IS GRANTED, and its Application (File No. BNPFT-20180508ACN) for a new FM Translator Station at Gallatin, Tennessee, IS HEREBY GRANTED.

Sincerely,



James D. Bradshaw
Senior Deputy Chief
Audio Division
Media Bureau

cc: Brayden Madison Broadcasting, LLC
Saga Communications of Tuckesse, LLC