

Request for Waiver

A waiver of the FCC policies to the extent necessary is respectfully requested to allow for displacement of the instant application facility from Channel 282 to Channel 249. The need for the displacement request results from circumstances beyond the control of the applicant and will result in equitable relief coupled with a more effective implementation of the Commission's overall policy.

On July 31, 2013, The Commission released a Public Notice, DA 13-1675, identifying a list of translator applications determined by the staff as not mutually-exclusive, singleton applications and opening a window for the filing of FCC Long Form 349 applications. On that list, DA 13-1675A2, BNPFT 20030317MDE was identified as a singleton, ripe for a long form application and available for grant. Importantly, the application, as originally applied for on March 17, 2003 on Channel 282, was fully compliant with the FCC contour overlap requirements with respect to station WAXY-FM, West Palm Beach, FL, Channel 282c0 (FCC file no. BNPFT-20030317MDE).

Thus, after nine years of patiently awaiting FCC action on its FM translator application, with the release of DA 13-1675A2, the FCC finally had launched a process that could lead to its grant. However, just as the FCC was launching this process, WAXY-FM filed to relocate from West Palm Beach to Miramar, Florida, degrading its station's class to a C1 in order to qualify for the move, but also thereby precluding applicant's nine year old singleton Miami translator application. See FCC file no. BPH-20120529AKO.

WAXY-FM is licensed to Miramar Florida with its transmitter at Boynton Beach, serving the West Palm Beach Market. To accomplish its objective of moving to Miami and its market, WAXY-FM will relocate its transmitter site 66 km south of its licensed location, where as a reduced coverage class C1, its predicted 60 dBu contour could nevertheless, completely encompass the Miami metropolis and, incidentally, the nine-year pending FM translator 60 dBu contour proposed in BNPFT 20030317MDE. This move, and its effect, is illustrated in the Attachment 12 exhibit titled "Overview of Proposal and Request for Waiver." The WAXY-FM application was recently granted on March 26, 2013. The result was utter and complete displacement of the FM translator sought in BNPFT- 20030317MDE on Channel 282.

The displacement proved devastating. A search was conducted for a new Channel that would fall within the minor change processing guideline. Adjacent Channels 279, 280, 284 and 285; and I.F.-related Channels 228 and 229 were examined. All of these Channels are precluded with the exception of Channels 280 and 284. Channels 280 and 284 were found to be potential options as the normal allocation requirements could be met on these Channels. However, these Channels resulted in LPFM preclusion and, therefore, are unavailable according to the FCC FM translator processing procedures.

A search was then conducted of all possible commercial Channel options. Channel 249 was found to be an open option *that would not involve any LPFM Channel preclusion*. See attached LPFM preclusion study for Channel 249. This application provides a complete demonstration of how all of the normal allocation requirements are met as well as the Living Way Non-Interference Criteria. Therefore, Channel 249 is an ideal available option, devoid of any negative consequences, and protective of the LPFM opportunities the Commission seeks to preserve. But for those LPFM opportunities, a simple adjacent Channel minor change would be available.

Indeed, if there were some way to “trade” the new found Channel 249 for either Channel 280 or 284, this applicant would be seeking only a simple adjacent channel minor change with the result that WXY-FM would be protected, no future LPFM opportunities would be precluded and this applicant would be able to proceed with his planned improved service for the listeners of Miami; a win-win-win-win result, with no losers.

To accomplish such an all-winners solution a waiver is required. It is a well-established principle that the Commission will waive its rules in specific cases where it determines, after careful consideration of all pertinent factors, that such a grant would serve the public interest without undermining the policy intended to be served. See *Wait Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969). Thus, the Commission is authorized to grant a waiver under Section 1.3 of its rules if the petitioner demonstrates good cause for such action.¹ Good cause, in turn, may be found and a waiver granted “where particular facts would make strict compliance inconsistent with the public interest.”² To make this 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.³ Section 73.3566(a) of the Commission’s rules provides that requests for waiver “shall show the nature of the waiver or exception desired and shall set forth the reasons in support thereof.” The Media Bureau utilizes a case-by-case analysis governed by decisional precedent.

The instant situation is highly unusual and meets the case-by-case analysis test warranting grant. Strict adherence to the Commission’s processing policy will result in a useless loss of service due to displacement without a remedy; useless only because loss of this translator service on Channel 249 would not violate any of the Commission’s rules or disserve any of its policy priorities. Rather, allowing the displacement change to Channel 249 will further *all* of the Commission’s policies of (a) protecting full-power station moves, (b) preventing preclusion of LPFM opportunities, and (c) fostering supplemental service via new translator stations that respect all of the protected services. Therefore, in this particular special situation, a waiver would not undermine the purpose of the policy and there is a stronger public interest in granting more non-interfering, non-mutually exclusive translator service to the people of Miami without any loss of alternative possibilities for LPFM.

¹ 47 C.F.R. § 1.3. See also *ICO Global Communications (Holdings) Limited v. FCC*, 428 F.3d 264 (D.C. Cir. 2005); *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164 (D.C. Cir. 1990); *WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969). *In the Matter of Remington Arms Company*, 20 FCC Rcd 18724; (2005) at ¶6.

² *Northeast Cellular*, *supra* at 1166; see also *ICO Global Communications*, *supra* at 269 (quoting *Northeast Cellular*); *WAIT Radio*, *supra* at 1157-59.

³ See, e.g., *WAIT Radio*, *supra* at 1157 (stating that even though the overall objectives of a general rule have been adjudged to be in the public interest, it is possible that application of the rule to a specific case may not serve the public interest if an applicant’s proposal does not undermine the public interest policy served by the rule); *Northeast Cellular*, 897 F.2d at 1166 (stating that in granting a waiver, an agency must explain why deviation from the general rule better serves the public interest than would strict adherence to the rule).

Moreover, it must be recognized that the benefits of permitting this channel substitution would be automatically recognized in Commission policy were this a reserved band request. Section 74.1233(e)(2) permits the Commission to select non-adjacent channels to resolve mutually-exclusive reserved band translator situations. Displacement by a full-power is the functional equivalent of mutual exclusivity among translator applicants, and the policies behind §74.1233(e)(2) serve this situation as well.

Finally, in deciding whether to grant a waiver, it is appropriate to take into account considerations of hardship, equity, or more effective implementation of overall policy on an individual basis.⁴ Hardship and equity are shown by the investment of nine-years for a translator application that by rights should be granted but for the newly filed application of WAXY-FM nearly a decade later. A grant of this request will result in a more effective implementation of **overall** policy, a “. . . more efficient radio . . . communications service . . .”⁵ and as shown by the quadruple win with no losers result, will provide more service and greater choice for the people of Miami. All this will be achieved through a grant of this waiver.

Accordingly, all of the standards of *Wait Radio* are met and this applicant should be allowed the opportunity to continue to pursue its nine-year long quest to provide additional and better service for Miami, only now on Channel 249. Given the now limited opportunities for FM translators, it is believed that the public interest will be served by permitting the applicant to diligently pursue this FM translator option without precluding any LPFM possibility. To do otherwise would serve no senior FCC policy or rule and would result in this spectrum remaining fallow.

⁴ *Petition of STi Prepaid, LLC for Declaratory Ruling, or in the Alternative, Petition for Waiver* DA 13-34, adopted January 11, 2013, citing *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969),

⁵ Communications Act of 1934, as amended, §1, 47 U.S.C. §151.