

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

RECEIVED
2014 OCT 20 P 2:46

In Re: Matter of)
)
WAY Media, Inc.) Facility ID No. 141101
W218CR, Central City, KY)
For a Minor Change) BPFT-20121116ALE

To: The Office of the Secretary
Attn: The Commission

RECEIVED - FCC

OCT 17 2014

Federal Communications Commission
Bureau / Office

APPLICATION FOR REVIEW

WAY Media, Inc, (“WAY”) and the Minority Media and Telecommunications Council (“MMTC”), pursuant to § 1.115 of the Commission’s rules, hereby respectfully apply for review of the September 19, 2014 letter decision, DA-1365 (the “Letter”) of the Chief, Audio Division, Media Bureau (the “Bureau”) that denied the captioned application.¹

As demonstrated herein, the Letter contains an erroneous finding as to an important and material question of fact (namely, satisfaction of the relevant waiver criteria) and involves a question of policy that has not previously been resolved by the Commission (the efficacy of waivers to enable AM stations to remedy listeners’ reception problems by moving available FM translators to within their service areas).

¹ WAY filed the subject application and thus clearly was aggrieved by the action taken in the Letter of which review is being sought herein. We further note that consummation of an application to assign the subject facility’s license from WAY to Hancock Communications, Inc. (“Hancock”) (BALFT-20121116AKR) continues to be frustrated, as grant of the subject application is a condition of closing. On February 12 and 16, 2013 MMTC filed comments that were included in an amendment to the subject application and thereby previously participated in this proceeding. In its comments, MMTC noted that about two-thirds of minority-owned broadcast stations, of which it is a foremost advocate, are AM stations, that the survival of that medium is of critical concern to it and its members, and that the relief represented by the subject application would materially advance that goal. Although the Letter (at pp. 3 and 5) referenced the desirability of the subject waiver for constituencies such as MMTC’s, relief was not granted.

Background – The intent of the subject waiver is to enable FM Translator Station W218CR, Central City, Kentucky (the “Translator”) to serve as a fill-in translator for AM Station WTCJ, Tell City, Indiana (“WTCJ”).² The specific waivers sought are to treat the proposed site move as a minor change notwithstanding geographic and channel changes in excess of the limitations of § 74.1233(a)(1) of the FCC rules. The waiver request was supported by statements from 16 organizations and dignitaries, including MMTC, numerous AM station licensees describing comparable existential hardships, and a legal memorandum presented by the National Association of Broadcasters to allay concern over potential *Ashbacker* issues.

WTCJ operates on 1230 kHz with only 850 watts on a local Class C channel with nighttime service greatly restricted by interference.³ WTCJ has served its community of license since 1948⁴ and is the only broadcast station licensed to serve Tell City,⁵ which has a current population of 7,292 and 476 firms.⁶ The waiver request stated that WTCJ’s viability had become threatened through impaired reception and a consequent precipitous loss of revenue, that its use of the Translator would enable it to provide reliable, full-time service to area residents and businesses and to increase local programming, services and listener involvement, and that loss of this unique local information source clearly would not serve the public interest.⁷

² We note that an affiliate of Hancock has begun operating W227CO, Cannelton, IL as a translator of WTCJ. It obtained W277CO through the 2003 translator filing window after nearly 11 years’ delay. W227CO is located approximately 11.3 miles distant from W218CR and will serve a substantially different area.

³ See BPFT-20121116ALE, “AM Revitalization Public Interest Reasons In Favor of WTCJ(AM) Waiver Request,” Statement of Bayard H. Walters, President of Hancock, at 1. Hancock is the proposed assignee of the Translator and the licensee of WTCJ, its proposed primary station.

⁴ *Id.*, at 3.

⁵ FCC CDBS Database, viewed October 9, 2014, official notice requested.

⁶ United States Census Bureau, State and County Quickfacts, Tell City, Indiana (<http://quickfacts.census.gov/qfd/states/18/1875248.html>) (last accessed Oct. 17, 2014), official notice requested.

⁷ BPFT-20121116ALE, “AM Revitalization Public Interest Reasons In Favor of WTCJ(AM) Waiver Request,” Statement of Bayard H. Walters, at 2-3.

The Letter contended that the standards for a waiver had not been met, that its benefits would be widely applicable to the AM industry, that potentially competing applicants would be unfairly foreclosed, and that the matter should be deferred to on-going rulemaking to explore avenues for eventually revitalizing AM broadcasting.

Questions presented:

In denying the waiver, did the Bureau overlook the special circumstances clearly presented in the application and the numerous supporting statements it contained?

Does the extreme, ongoing delay in fashioning rulemaking relief for the AM service, the desperate need for which the Commission has repeatedly acknowledged, compel resort to this and comparable waivers in order to enable that essential service to survive?

Discussion – As the Letter correctly states, waiver requests must be supported by two showings: that (1) special circumstances warrant a deviation from the general rule; and (2) such deviation better serves the public interest.⁸ However, contrary to the Letter’s conclusion, the subject application manifestly met both prongs of the required showing.

The supporting documentation in the record of this proceeding amply demonstrated that AM stations are increasingly precluded by interference from reaching their audiences, that consequently their very existence is threatened, and that enabling FM translators to move to serve as fill-in translators is the only practical solution to this dire problem. Specifically:

- AM stations required to severely cut back power at night need FM translators to provide reliable full-time emergency and other essential information.⁹

⁸ Letter at 2 and n. 17, citing *NetworkIP, LLC v. FCC*, 548 F.3d 116, 125-128 (D.C. Cir. 2008) and *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990).

⁹ See, e.g., Statement of WESR AM/FM, January 16, 2013 (“The ability to acquire a FM translator for my AM station would greatly increase the ability of WESR AM to serve the community in times of emergency and provide valuable public service announcements, emergency weather and urgent local news during the overnight hours. Recently during Sandy, WESR AM was forced to operate on 50 watts due to nighttime restrictions reducing the number of people covered by our signal by 90%.”); Statement of Metroplex Communications, Inc., January 18, 2013 (“The need to reduce power at night eliminates the availability of our signal to a large portion of the residents who depend upon us.”); Statement of Payne 5 Communications, LLC, January 17, 2013 (“most AM stations either go off at dusk or have such reduced broadcasting capabilities that the public is not well served at all”); Statement of Simmons Multimedia dated January 17, 2013 (“Due to the increased noise floor both of the stations [located along

- Nearby translators are scarce and command artificially inflated prices that most local AM stations cannot afford.¹⁰
- Translators have already proven to be a successful solution.¹¹
- Immediate relief is needed prior to implementation of ultimate long-term solutions, the feasibility of which is far from certain.¹²

The Letter made no mention of any of this record evidence, which clearly constituted a special circumstance that mandated deviation from the present rule as the only viable means of obtaining the essential relief being sought. In that regard, we note that the Commission has previously found that merely preserving the competitive balance in a relatively large market rose to the level of “special circumstances” meriting waiver of its otherwise absolute prohibition against certain joint sales agreements.¹³ Surely the viability of the sole station serving a sizeable community is even more compelling. Indeed, it is a bedrock principle that the potential demise

the US/Canadian border in North Dakota] now struggle to serve their communities, particularly at night. ... [A]t night ... we often hear negative comments from listeners and advertisers in regards to the ‘poor signal quality’ of our local high school sports broadcasts which is a direct result of noise generated by everything from overhead power lines to dimmer switches, computers, etc., etc.”).

¹⁰ See, e.g., Statement of MMTC, February 12, 2013 (“the Commission’s Section 74.1233(a)(1) regulation that restricts FM translator moves based on a minimal miles radius calculation ... has resulted in it being almost impossible for many stations ... to find an FM translator available for acquisition.”); Statement of Metroplex Communications, Inc., January 18, 2013 (“Ever since the Commission authorized AM on FM translators, I have worked diligently to acquire an FM translator so as to make our community-centric programming more widely available. However, the fact that WBGZ is located within a major market metro (St. Louis), the regulations regarding the movement and frequency migration of any available translators have thwarted my efforts.”); Statement of SESAC, April 3, 2013 (“While AM broadcasting on FM translators has proved to be transformative for operators and the communities they serve, we have learned that the availability of FM translators is in fact quite limited, based on the minimal miles radius restriction in Section 74.1233(a)(1) of the Commission’s rules.”).

¹¹ See, e.g., Statement of Miller Media Group, November 28, 2012 (“As a licensee of 3 AM radio stations, all of which are simulcast on FM translators we’ve been blessed to acquire and use, I can personally attest to the importance of continuing to provide local radio service that’s been heard for decades on my AM stations, by having the same programming simulcast on FM translators that are not susceptible to man-made interference as the AM signal.”).

¹² See, e.g., Statement of MMTC, February 12, 2013 (“Even if the Commission allowed AM stations to increase their power, that change would not only be cost prohibitive for most AM station owners, but it would still not be enough to address noise interference issues. Moreover, although MMTC has long championed moving AM to Channels 5 and 6, we recognize the difficulty of that occurring in a time frame that would be relevant to WTCJ’s present application.”).

¹³ *David D. Oxenford, Esq. (KEGK(FM), Wahpeton, ND)*, 21 FCC Rcd 9805 (Media Bureau, 2006).

of a community's only local station severely disserves the public interest.¹⁴

It cannot possibly be doubted that the relief requested by WAY and MMTC will serve the public interest better than threatening the survival of stations like WTCJ and thereby depriving Tell City and comparable communities of their only local media outlet. Yet the subject situation is hardly unique. Even aside from considerations of localism, the loss will be felt most heavily by minority and diverse audiences who rely upon AM stations and have few or no alternative sources of crucial information.¹⁵ Indeed, the Commission prefaced its pending examination of methods to bolster the AM service with a compelling overview of the essential nature of AM, the crucial need to ensure its survival and the severe challenges that must be overcome.¹⁶

The Letter further faults the requested waiver on the ground that it would have applicability to parties beyond WTCJ and would become a boon to the AM industry.¹⁷ Yet, the prospect that a waiver will be beneficial to many – *i.e.*, that it will serve the greater public interest – is hardly a flaw at all, much less a fatal one. Indeed, there is ample precedent for favorable consideration of waivers of equally wide potential scope. Thus over the course of nearly two decades the so-called “Arizona waiver” relieved hundreds of stations from the core

¹⁴ See, e.g., *Policies to Promote Rural Radio Service and to Streamline Allotment and Assignment Procedures*, 26 FCC Rcd 2556 (2011) at ¶ 39 (loss of a *second* local service in communities of 7,500+ population to be strongly disfavored when assessing public interest of proposed community changes).

¹⁵ See Statement of MMTC, dated February 12, 2013 (“Presently, around two-thirds of minority-owned radio stations are AM stations. Thus, these regulations are even more detrimental to minority broadcasters, who typically own stations with inferior technical parameters and have a difficult time reaching their intended audience because the stations are located far from the centers of the urban markets they generally serve. By making it easier for AM stations to move to existing FM translators farther away, more stations would be able to re-broadcast their AM signals and thus increase accessibility for AM listeners in their respective areas while furthering the Commission’s goals.”)

¹⁶ *Revitalization of the AM Radio Service*, Notice of Proposed Rulemaking, 28 FCC Rcd 15221 (2013) (“*AM Revitalization NPRM*”). Therein, the FCC noted that news/talk, sports, foreign language, religious and local programming formats are common on the AM band (¶ 3), that consumer migration to newer media services has been fueled by AM’s technical limitations, lower fidelity, lack of advanced features, interference and restrictions upon night-time operation (¶¶ 4-7) and that further relief was needed (¶¶ 11-43).

¹⁷ Letter at 3, first paragraph.

requirement that a majority of programming originate from a local main studio.¹⁸ Nowadays, noncommercial educational stations continue to obtain routine waiver exemption from the main studio location requirement altogether.¹⁹ And – most tellingly – the very set of “Mattoon waivers” that the Letter purports to distinguish from the subject request²⁰ are still being considered and issued, notwithstanding the pendency of rulemaking that seeks to eliminate the need to handle such cases on an *ad hoc* basis through the issuance of individualized waivers.²¹ Consequently, the prospect that other similarly-situated stations might obtain much-needed relief pending reconsideration of the underlying rule cannot be a bar to grant of the subject relief.

The second ground cited by the Letter for denial of the waiver was ostensible concern with *Ashbacker*-related procedural concerns.²² Yet the Bureau candidly recognized that its reliance upon *Ashbacker* is overly broad. As it correctly notes, *Ashbacker* held that “where two *bona fide* applications are mutually exclusive, the grant of one without considering the other violates the statutory right of the second applicant to comparative consideration.”²³ Here, there are no competing applications, and so the only relevant question is the degree, if any, to which

¹⁸ *Arizona Communications Corp.*, 25 FCC 2d 837 (1970). In *Main Studio and Program Origination Rules*, 3 FCC Rcd 5024 (1988), the Commission codified a lesser standard for main studio program origination and thereby obviated the need for continuing to grant “Arizona” waivers, which it had been issuing for nearly two decades.

¹⁹ See, e.g., *University System of New Hampshire Board of Trustees*, 27 FCC Rcd 12315 (2012). Such waivers are routinely issued notwithstanding the continuing core importance of a local main studio, *Main Studio and Program Origination Rules*, 3 FCC Rcd 5024 (1988) ¶¶ 36-38. Beginning with *Sound of Life, Inc.*, 4 FCC Rcd 8273 (1989), hundreds of such waivers have been granted over the past quarter century and no end is in sight.

²⁰ Letter at 3, citing *John F. Garziglia, Esq.* (W263AQ, Mattoon, IL), 26 FCC Rcd 12685 (2011). Although unpublished, waivers are being routinely issued based upon the same set of criteria that were deemed to warrant relief in that particular case (*i.e.*, waiving the requirement that a minor translator move exhibit overlap of licensed and proposed contours). See, for example, BPFT-20140612ABY (W254AX, Antigo, WI), granted July 24, 2014.

²¹ *AM Revitalization NPRM*, *supra*, at ¶ 18.

²² Letter at 3-5, citing *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327 (1945).

²³ Letter at n. 10. See, also, Letter at text at n. 23.

Ashbacker compels an opportunity for filing potentially competing applications.²⁴ As the waiver request pointed out, that opportunity is far from absolute, or else the entire distinction between “major” and “minor” changes would crumble.²⁵ Thus, in its 2006 Allocation Streamlining order the Commission permitted non-mutually-exclusive channel changes to be considered “minor” and thus entitled to cut-off protection upon filing where grant of the associated application was found to serve the public interest.²⁶ Even that was hardly a unique accommodation – in reforming the broadcast license renewal procedures Congress eliminated the decades-long right to file a competing application for a new, replacement station and instead mandated grant of a license renewal that met rudimentary public interest standards.²⁷

²⁴ There is ample precedent for granting relief without regard to others’ rights to file hypothetical competing applications when an equivalent channel is available. See, e.g., *Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations (Leesville, Louisiana)*, 14 FCC Rcd 9011 (Allocations Branch, 1999). Here, as the waiver request noted, Tell City is not in a spectrum-limited market, and so alternative channels are available to accommodate others who might seek to establish or relocate a translator there. In that regard, the Commission has recognized that other parties’ ability to proactively request their own facility changes rather than wait for an opportunity to file a mutually-exclusive application, together with the desirability of expediting the provision of enhanced broadcast service to the public, justifies a first come-first served procedure notwithstanding *Ashbacker*. See, e.g., *Revision of Procedures Governing Amendments to FM Table of Allotments and Changes of Community of License in the Radio Broadcast Services*, 21 FCC Rcd 14212 (2006) at ¶ 9.

²⁵ BPFT-20121116ALE, “AM Radio Revitalization Waiver Request” at 4. In that regard, it is significant that every minor site change application filed on a “first come-first served” basis necessarily creates a new area which then becomes protected from the filing of further applications that would be mutually-exclusive with it. Consequently, that time-honored procedure inherently conflicts with an absolute reading of *Ashbacker* as requiring notice to potentially-interested applicants and an opportunity for them to file mutually-exclusive applications. For that very reason any attempt to rely upon mutual exclusivity as a means of ensuring *Ashbacker* rights is a flawed rationale.

²⁶ *Id.*, at 3-4, citing *Revision of Procedures Governing Amendments to FM Table of Allotments and Changes of Community of License in the Radio Broadcast Services*, Report and Order, 21 FCC Rcd 14212 (2006).

²⁷ *Broadcast License Renewal Procedures*, 11 FCC Rcd 6363 (1996). A renewal must be granted so long as there have been no serious violations by the licensee of the Communications Act or the FCC rules; there have been no other violations of the Act or the rules which, taken together, would constitute a pattern of abuse; and the station has served the public interest, convenience and necessity. *Id.*, at ¶ 3, and see 47 U.S.C. §309(k)(1). The final showing is assumed in the absence of devastating allegations presented by opponents, with the result that for all practical purposes renewal has become automatic. Of especial relevance here, the former opportunity to file competing applications for a new station that would be mutually-exclusive with the renewal applicant has entirely disappeared; see 47 U.S.C. §301(d). Thus *Ashbacker* cannot possibly be read as mandating opportunities to file competing applications where the public interest dictates otherwise.

It is further significant that *Ashbacker* arose in a primordial era of communications when AM broadcasting was the only functional electronic mass medium, and so the opportunity to apply for such facilities was the only way to enter the industry and be heard. As the FCC and the courts have repeatedly recognized, the generations since then have seen an explosive evolution in mass media that has relegated AM, and, indeed, broadcasting generally, to an increasingly diminished role among a plethora of other effective media.²⁸ Consequently, although by default *Ashbacker* applied to the one and only viable electronic mass medium of its time, the need to extend such rights to all broadcasting facilities and markets has long since passed.²⁹

The final ground upon which the Letter denied relief was that the Commission could take the matter up in its AM Revitalization rulemaking.³⁰ But the far more relevant concern transcends abstract administrative theory to enter the realm of practicality. As the Commission itself recognizes, AM is in desperate need of immediate relief.³¹ Yet, undoubtedly sincere intentions aside, ***nothing of use has been done to meet that need!*** It has been over two years since Commissioner Pai addressed the NAB Radio show urging that the FCC launch an AM radio revitalization initiative in early 2013 that was to be completed within a year.³² Yet it was not until late 2013 that the *AM Revitalization NPRM* was released. At that time, he stated:

²⁸ See, e.g., *AM Revitalization NPRM*, *supra*, at ¶ 4.

²⁹ The FCC itself clearly recognizes this principle, as it has proposed opening a window for new FM translators for which only existing AM stations would be eligible, thus denying other legally-qualified entities the right to apply. *AM Revitalization NPRM*, *supra*, at ¶¶ 11-18.

³⁰ Letter at 5. The same section of the Letter cited the “potentially far-reaching effects of this waiver on the AM industry.” As we have already noted, *supra*, at 5-6, potential reliance upon a waiver grant by other similarly-situated parties cannot justify withholding relief in favor of eventual rulemaking.

³¹ *AM Revitalization NPRM*, *supra*, at ¶ 2. There, the FCC cited some dire statistics: “In the mid-1980s, AM radio represented 30 percent of the nation’s radio listening hours. By 2010, that number had dropped to 17 percent, with AM radio comprising only 4 percent of listening hours among younger Americans.” *Id.*, footnotes omitted.

³² <http://www.fcc.gov/document/commissioner-pai-remarks-radio-show> (last accessed Oct. 17, 2014).

In the short term, we'll need to act quickly to provide AM broadcasters with relief while we come up with more permanent fixes for the band's difficulties. ... We should also make it easier for AM stations to get and use FM translators. In 2009 the FCC amended its rules to allow AM stations to be rebroadcast on FM translators. I've heard firsthand how this step has been a lifeline for many AM broadcasters. But I've also heard from countless station owners who are frustrated by their inability to get a translator.³³

Now another year has passed, the comment cycle closed in March, and yet no action has been taken. While the Commission's current focus reportedly seems to be on opening a window to enable each AM station to apply for one translator, there is no assurance, especially in congested markets, that sufficient channels and usable sites will be available to accommodate them. Nor is there any suggestion of how mutually-exclusive applications can be resolved quickly and in full accordance with FCC auction mandates and *Ashbacker* requirements.

Rulemakings present a further practical challenge of timing. The rulemaking that paved the way for the instant matter, enabling FM translators to rebroadcast AM stations, was not decided until nearly two years after the rulemaking notice was issued.³⁴ *AM radio cannot wait that long.* Rulemaking clearly is not a timely route to redress a critical situation. Here, as the waiver request pointed out, immediate relief *is* available. Grant of the subject waiver – and, yes, similar waivers that other fraught AM licensees may need – will provide a speedy and efficient solution to a pressing existential problem.³⁵

³³ https://apps.fcc.gov/edocs_public/attachmatch/DOC-323398A1.pdf (last accessed Oct. 17, 2014).

³⁴ See, respectively, *Amendment of Service and Eligibility Rules for FM Broadcast Translator Stations*, Notice of Proposed Rulemaking, 22 FCC Rcd 15890 (2007) and *Amendment of Service and Eligibility Rules for FM Broadcast Translator Stations*, Report and Order, 24 FCC Rcd 9642 (2009). Reconsideration and judicial review of controversial decisions threaten to prolong implementation yet further. Thus, reconsideration is still pending of the 2006 decision to streamline AM community of license changes, cited at n. 29 of the Letter.

³⁵ The other long-term remedies proposed in the *AM Revitalization NPRM* all suffer from problems that may preclude immediate relief. Specifically, site changes, power increases (and consequent on-going utility cost increases) and other facility modifications will be prohibitively expensive for stations that already face financial distress. VHF migration or digital conversion would be highly desirable but could be expensive and will require a lengthy transition period for consumers to replace their receivers.

Conclusion – In view of the foregoing, WAY and MMTC respectfully request that the subject waiver be granted, so that not only W218CR but other FM translators can move to enable WTCJ and other AM stations with impaired reception to reach listeners in their service areas.³⁶

Respectfully Submitted,

WAY MEDIA, INC.

By Bob Augsburg / P. Gutmann
Bob Augsburg, Its President

P.O Box 64500
Colorado Springs, Co. 80962
(719) 533-0300
bob@wayfm.com

MINORITY MEDIA AND
TELECOMMUNICATIONS COUNCIL

By David Honig / P. Gutmann
David Honig, Its President Emeritus and
General Counsel

3636 16th Street NW, Suite B-366
Washington, DC 20010
(202) 332-0500
david@davidhonig.org

Special Counsel:

Peter Gutmann, Esq.
Womble Carlyle Sandridge & Rice, LLP
1200 19th Street, NW, 5th Floor
Washington, DC 20036
(202) 857-4532
pgutmann@wcsr.com

October 17, 2014

³⁶ Alternatively, even if the Commission were to deny the specific relief requested by WAY and MMTC, it should consider amending its definition of “minor” translator changes to include site moves to within the 0.025 mV/m contour of a proposed AM primary station in a spectrum-available market. In that way, needed service would be expedited without foreclosing opportunities for others to file for comparable (and potentially competing) facilities.

CERTIFICATE OF SERVICE

Peter Gutmann, an attorney at the law firm of Womble Carlyle Sandridge & Rice, PLLC, hereby certifies that he caused a true copy of the foregoing "Application for Review" to be mailed, postage prepaid, on this 17th day of October, 2014, to the following:

Peter H. Doyle, Esq.
Chief, Audio Division, Media Bureau
Federal Communications Commission
445 12th Street SW
Washington, DC 20554

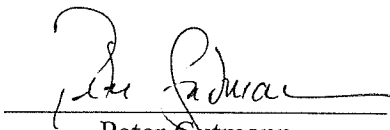
Honorable Tom Wheeler, Chairman **
Federal Communications Commission
445 12th Street SW
Washington, DC 20554

Honorable Mignon Clyburn **
Federal Communications Commission
445 12th Street SW
Washington, DC 20554

Honorable Jessica Rosenworcel **
Federal Communications Commission
445 12th Street SW
Washington, DC 20554

Honorable Ajit Pai **
Federal Communications Commission
445 12th Street SW
Washington, DC 20554

Honorable Michael O'Rielly **
Federal Communications Commission
445 12th Street SW
Washington, DC 20554



Peter Gutmann

** – By hand.