

AM Radio Revitalization Waiver Request

In accord with the AM radio revitalization goals of the Federal Communications Commission,¹ Hancock Communications, Inc., the licensee of WTCJ(AM), Tell City, Indiana, and WAY Media, Inc. jointly request,² pursuant to Section 1.3 and Section 73.3566(a) of the Commission's rules, a waiver of Section 74.1233(a) (1) of the Commission's rules to allow for a one-step move of W218CR, Central City, Kentucky,³ moving the FM translator service from its current location and its current Channel 218, and replacing that service at a location and on Channel 279 from which WTCJ(AM) may be re-broadcast on the translator.

In order to provide a practical, workable, limitation to the translator transmitter site move under this waiver request and to protect LPFM availability, it is noted that the translator transmitter site is currently within the WTCJ(AM) 0.025 mV/m interference contour specified in Section 73.37(a) of the Commission's rules, and the move is not to an LPFM spectrum-limited market.

INTRODUCTION

Section 1.3 of the Commission's rules states that rule provisions may be waived "for good cause shown." 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.⁴

¹ See e.g. Remarks of Commissioner Ajit Pai Before the [National Association of Broadcasters] Radio Show, Dallas, Texas, September 19, 2012 at page 5 in which Commissioner Pai asked the FCC to "focus on one basic question: are there regulatory barriers we can remove to help this [AM radio] sector rebound". <http://www.fcc.gov/document/commissioner-pai-remarks-radio-show>

² An assignment of license application is on file in which Hancock Communications, Inc., the licensee of WTCJ(AM) is seeking FCC consent to purchase the translator from WAY Media, Inc., the licensee of the translator, with a closing of the transaction conditioned upon a grant of this modification application.

³ License application pending (FCC File No. BLFT-20121026ABM). The translator will have the call sign W218CR upon a grant of the license application.

⁴ See *Northeast Cellular Telephone Co. v. F.C.C.*, 897 F.2d 1164, 1166 (D.C. Cir. 1990). See also *WAIT Radio v. F.C.C.*, 418 F.2d 1153, 1157-59 (D.C. Cir. 1969) ("a waiver is appropriate only if special circumstances warrant a deviation from the general rule and such deviation will serve the public interest").

In a rule applicable to wireless services, Section 1.925(b)(3) of the Commission's rules contains a rules based standard providing that:

The Commission may grant a request for waiver if it is shown that:

- (i) The underlying purpose of the rule(s) would not be served or would be frustrated by application to the instant case, and that a grant of the requested waiver would be in the public interest; or
- (ii) In view of unique or unusual factual circumstances of the instant case, application of the rule(s) would be inequitable, unduly burdensome or contrary to the public interest, or the applicant has no reasonable alternative.

THE REQUESTED WAIVER WILL SERVE THE PUBLIC INTEREST

The requested waiver of Section 74.1233(a)(1) will serve the public interest in the following ways:

- The underlying rule currently limiting FM translator transmitter site moves to only several kilometers and only to adjacent channels is an FCC regulatory procedural barrier of outdated public interest benefit as it is in public interest to bring needed in-contour FM translator service to the listeners of an AM primary station.
- A grant of this waiver will remove the FCC's current procedural regulatory barriers to moving the translator's transmission facility to a transmitter site and channel that will aid in the FCC's AM revitalization goals in bringing better service from the primary station, WTCJ(AM), to the public.
- A grant of this waiver is procedural only and does not involve a waiver of the FCC's substantive rules.
- A grant of this waiver fits within existing Commission precedent and policies which in an analogous way allows for same class full-service FM station non-adjacent channel modifications to be granted as minor modifications even though such facilities are not mutually-exclusive, and even though both can co-exist, deeming the new channel to be a replacement service for the service removed from the existing channel.
- A grant of this waiver fulfills the statutory purpose of FM translators re-broadcasting a primary station's signal. Section 307(b) considerations are not relevant to FM translators as FM translators are awarded pursuant to Section 74.1201(a) of the Commission's rules "for the purpose of retransmitting the signals of an AM or FM broadcast station ... in order to provide broadcast service to the general public"

- A grant of this waiver will not result in the move of an FM translator into or within an LPFM spectrum-limited market, thus avoiding raising concerns of compliance with the Local Community Radio Act of 2010.
- A grant of this waiver request will be limited in scope as it is proposed to be applicable only to the in-contour carriage of an AM broadcast station, and be applicable only if the currently licensed FM translator site is within the AM station's 0.025 mV/m interference contour specified in Section 73.37(a) of the Commission's rules in order to limit the moves of the FM translator in a rational, considered manner and to comply with the expectations of *Ashbacker*.

THIS WAIVER REQUEST IS IN ACCORD WITH *ASHBACKER* RESTRICTIONS

Any requested waiver of Section 74.1233(a)(1), the FCC's FM translator minor change rules, must satisfy the restrictions imposed by *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327 (1945) ("*Ashbacker*"). *Ashbacker* requires that the Commission "use the same set of procedures to process the applications of all similarly situated persons who come before it seeking the same license".⁵

In the past, the Commission has justified changes in its FM translator minor change rules including: (1) streamlined procedures that are more appropriate and efficient for changes that are "technical and minor" in nature⁶, and (2) procedures under which other prospective applicants will not be unfairly prejudiced because they can "predict whether other area stations have the potential to seek facilities increases based on applicable contour protection requirements and ... file first for enhanced facilities."⁷

This waiver request is grounded in the Commission's rationale for its changes in *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 14,212 (2006) ("*Allocation Streamlining*"). In *Allocation Streamlining*, after thoroughly discussing *Ashbacker*, the FCC made a change to the full-service FM station rules at Section 73.3573(a)(1)(iv). In *Allocation Streamlining*, the FCC ruled that "channel substitutions for authorized facilities will be treated as minor changes."⁸ The channel substitutions authorized in *Allocation Streamlining* are not mutually-exclusive facilities. Both may mutually co-exist. The authorized channel substitutions replace service on one channel with service on another channel, by making the determination that same-class channels are substantively equal, even though as a practical

⁵ *Maxcell Telecom Plus, Inc. v. FCC*, 815 F.2d 1551, 1555 (D.C. Cir. 1987). See *Committee for Effective Cellular Rules v. FCC*, 53 F.3d 1309, 1321 (D.C. Cir. 1995) ("the ability to compete on an equal basis ... is the essence of *Ashbacker*").

⁶ 1998 Biennial Regulatory Review, First Report and Order, 14 FCC Rcd 5272, 5277 paragraph 7 (1999).

⁷ 1998 Biennial Regulatory Review, Notice of Proposed Rulemaking, 13 FCC Rcd 14859, 14871-72 paragraph 49 (1998).

⁸ *Allocation Streamlining* at paragraph 16.

engineering matter different channels may have different real-world propagation and interference characteristics.

This waiver request is asking that the Commission apply the same rationale to FM translator modifications seeking to replace licensed service with a like licensed service to serve the FCC goal of AM revitalization. Unlike full-service FM stations which are awarded under Section 307(b) of the Communications Act to serve various communities of license, fill-in FM translators are rather awarded to supplement and strengthen the in-contour service from the primary full service stations. The service area of a fill-in FM translator is limited by the FCC's rules and policies to not exceeding the service area of the primary station.

This requested waiver streamlines the procedures for the replacement of FM translator service at one location in order to offer FM translator service at another location where the specific FM translator can serve the goals of AM revitalization. As the requested move under the waiver is limited to FM translators within the interference contour of the AM station, prospective applicants will not be unfairly prejudiced as the parameters of this waiver will enable other FM translator licensees in accord with *Ashbacker* to predict whether other area stations have the potential to seek facility changes that might conflict with the proposed translator modification application. Therefore, the requirements of *Ashbacker* will be met by a grant of this waiver request.

Foreclosing applicants for new services cannot under Commission precedent be an *Ashbacker* concern as if it was a concern, then no FM modification application of any kind would be acceptable for filing. The Commission long-ago in *Allocation Streamlining* resolved that the analogous replacement of service with another like service did not invoke *Ashbacker* concerns. Likewise, the replacement of FM translator service on a particular channel at a particular location, with a like FM translator service on another channel at another location, when limited by an area encompassed by the interference contour of an AM station, is the kind of modification that should not be subject to *Ashbacker* concerns. In any event, the replacement of service envisioned by this waiver request opens an existing area and existing channel not currently available, to new applicants for new applications in the future.

Thus, just as the requirements of *Ashbacker* are not violated by the replacement of one same-class FM channel with a substitution of another same class FM channel, likewise, the requirements of *Ashbacker* will not be violated by the replacement of one FM translator service area with the substitution of another FM translator service area. As a natural extension, the requirements of *Ashbacker* will also not be violated by the replacement of one FM translator channel with a substitution of another FM translator channel.

CONCLUSION

For the FCC's goal of AM revitalization, it is requested this transmitter and channel substitution be allowed through this waiver request for this FM translator proposing to re-broadcast an in-contour WTCJ(AM) as the FM translator seeking the modification is within the AM station's 0.025 mV/m interference contour specified in Section 73.37(a) of the Commission's rules, and the move is not to an LPFM spectrum-limited market.

Accordingly, a waiver, for the purposes of the FCC's goal of AM revitalization, is hereby requested of Section 74.1233(a) (1) of the Commission's rules to allow for a one-step move of the translator, removing service from its current location and on its current channel, and replacing that service at the applied-for location and on Channel 279, from which WTCJ(AM) may be re-broadcast as the primary station on the FM translator in accord with the FCC's AM radio revitalization goals.