July 16, 2013

Mr. David Grimaldi
Chief Counsel and Senior Legal Advisor
Office of Acting Chairwoman Mignon Clyburn
Federal Communications Commission
445 12th Street SW
Washington DC 20554

Re: Effect of *Ashbacker Radio v. FCC* on the "Tell City" Waiver Request

Dear Mr. Grimaldi:

The attached memorandum, prepared by Harry F. Cole and Frank R. Jazzo of Fletcher, Heald & Hildreth, provides a comprehensive analysis of the application of *Ashbacker Radio Corp v. FCC*, 326 U.S. 327 (1945) to the joint request of Hancock Communications, Inc. and WAY Media, Inc. for a waiver of 47.C.F.R. § 74.1233(a)(1). Approval of this request would allow a minor modification, one-step move of FM Translator Station W218CR, Central City, Kentucky, to Tell City, Indiana, where it would be used to rebroadcast the signal of Hancock's WTCJ(AM) ("Tell City waiver").[1]

The memo examines *Ashbacker* and related precedent, and concludes that *Ashbacker* does not present any legal obstacle to granting the Tell City waiver request.

To summarize, *Ashbacker* stands for the principle that, when two *bona fide*, similarly-situated applications are mutually exclusive, both are entitled to be considered for grant.[2] *Ashbacker* does not require the FCC to treat potential

[1] File No. BPFT-20121116ALE. The waiver also requests a change in the translator's operating channel from Channel 218 to Channel 279.
[2] 326 U.S. at 333. Ashbacker involved two broadcasting companies which filed competing applications for licenses to use the same radio frequency. The Commission granted the earlier-filed application and offered a subsequent hearing to the other. The Court found the Commission's bifurcated approach unfair to the losing applicant, partly because it imposed the additional burden of proving that the winner's license should be revoked.

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applications as mutually exclusive. Rather, *Ashbacker* only requires that the Commission provide adequate public notice and a fair opportunity for other parties to file competing applications.

Ashbacker presents no bar to approving the Tell City request.[3] The Commission placed the Tell City request on public notice on November 21, 2012, approximately eight months ago. No other parties have stepped forward with an objection, let alone a competing application. And, there is ample spectrum available in the market to accommodate future applications.

Nothing in *Bachow Communications, Inc. v. FCC*, 237 F.3d, 683 (D.C. Cir. 2001) would suggest a different result. *Bachow* involved applications for 39 GHz licenses. Faced with many more applications than it had anticipated, in that case, the Commission changed its processing rules well after applications had been filed in an announced 60 day filing window. Instead the Commission dismissed applications filed after 30 days. The D.C. Circuit analyzed the case under the *Ashbacker* doctrine but concluded that 30 days was sufficient notice, pursuant to Section 309(b) of the Communications Act and approved the Commission's approach. *Id*. at 689.

The situation here should be even easier because there are no actual competing applications for the particular FM frequency in Tell City. Channel 279 in Tell City has been available for many years, available to other applicants for any service that would preclude Hancock's requested translator.[4] However, no one has ever sought to use the frequency, including during the period after the waiver request was filed and placed on public notice.

The Commission has repeatedly determined that *Ashbacker* applies only to parties who are actual applicants, and not to prospective applicants.[5] Under this precedent, the Tell City waiver cannot properly be denied because of the speculative rights of some hypothetical applicants who may one day express an interest in a competing use for the Tell City frequency. Hancock seeks to use an FM translator in Tell City to improve its signal and expand service during nighttime hours for the benefit of its local community.

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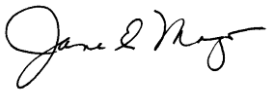
[3] Approval of the waiver is also warranted because it serves the public interest in enabling Hancock to enhance the service of WTCJ(AM).

[4] Only another equivalent secondary service, such as another translator or booster, would be precluded by approval of the waiver, as opposed to any primary service.

[5] *See FM Channel and Class Modifications*, 8 FCC Rcd 4735 (1993); *Modification of FM and TV Authorizations to Specify a New Community of License*, 4 FCC Rcd 4870 (1989). Both cases cite *Reuters Ltd. V. FCC*, 781 F.2d 946, 951 (DC. Cir. 1986).

Given the public interest benefits of allowing Hancock to improve the service of WTCJ(AM), NAB respectfully submits that the Commission may and should promptly grant the above-referenced request for waiver.

Respectfully submitted,



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MEMORANDUM

TO: Jane Mago, Executive Vice President/General Counsel
Larry Walke, Associate General Counsel

FROM: Frank R. Jazzo
Harry F. Cole

DATE: July 16, 2013

RE: Effect of *Ashbacker Radio Corp. v. FCC* on File No. BPFT-20121116ALE

Hancock Communications, Inc. ("Hancock") and WAY Media, Inc. ("WAY") have requested a waiver of Section 74.1233(a)(1) of the Commission's rules in connection with an application (File No. BPFT-20121116ALE) seeking modification of FM Translator Station W218CR. The application proposes changes in the translator's location (to Tell City, Indiana) and operating channel (from Channel 218 to Channel 279). The waiver seeks to have the application treated as one proposing a "minor change" rather than a "major change".

A question has arisen as to whether the requested waiver would be precluded by *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327 (1945). The following analyzes *Ashbacker* and related precedent with particular attention to their impact on the waiver request.

Summary

Ashbacker does not bar immediate grant of the WAY application. No applications mutually exclusive with the WAY application were filed during the 30-day period following public notice of the acceptance of the WAY application (or, for that matter, during the six months since the close of that period). If the Commission determines that the public interest warrants grant of the application without further opportunity for competing applications, it may do so.

The *Ashbacker* Decision

Ashbacker arose in the particular context of the Commission's procedures, in the mid-1940s, for the processing of applications for new and modified AM authorizations. As is still the case today, the Communications Act then provided that, if an application could not be granted, it would be designated for hearing. *See* 47 U.S.C. §309(e). Under the Commission's then applicable procedures, a pending application (Application A) was subject to the filing of mutually exclusive applications up until the day that Application A was granted.

In Ashbacker, an application of Fetzer Broadcasting Company for a new station had been pending since March, 1944. In May, 1944, Ashbacker Radio Co. filed an application for modification of its existing station – a modification which was mutually exclusive with Fetzer's proposal. In June, 1944, the Commission granted Fetzer's application and designated Ashbacker's for a separate hearing. Ashbacker appealed, and the Supreme Court held that the Commission's bifurcated approach was impermissible because "where two bona fide applications are mutually exclusive, the grant of one without a hearing to both deprives the loser of the opportunity which Congress chose to give him." 326 F.2d at 333.

Presumably recognizing the difficulties posed by the problem of daisy-chain mutual exclusivities which could, as a practical matter, prevent any application from being granted, the Court in *Ashbacker* suggested that the Commission might implement some form of cut-off procedure requiring applications to be filed by a date certain in order to be deemed "mutually exclusive" and, thus, entitled to comparative consideration. *Ashbacker*, 325 U.S. at 333, n. 9. In other words, the *Ashbacker* Court itself expressly signaled that the "guaranteed-hearing-for-mutually-exclusive-applicants" was by no means absolute. To the contrary, the Court acknowledged that the agency has leeway to develop procedures and limitations circumscribing the availability of comparative consideration of any sort.

Subsequent Refinement of the *Ashbacker* Doctrine

Since then, the Commission has adopted a number of different mechanisms for "cutting-off" applications and thereby defining the universe of "bona fide" mutually exclusive applications entitled to comparative consideration. Additionally, the Commission has largely, if not entirely, abandoned the hearing process in favor of alternatives (e.g., lotteries, auctions, point systems) for the disposition of competing applications. The courts have approved such measures as long as the Commission "use[s] the same set of procedures to process the applications of all similarly situated persons who come before it seeking the same license." *Maxcell Telecom Plus, Inc. v. FCC*, 815 F.2d 1551, 1555 (D.C. Cir. 1986). The Commission's latitude in this regard is broad: "coping with the difficulty [created by the *Ashbacker* doctrine] lies within the discretion of the

Commission, so long as its solution is reasonable." *Ranger v. FCC*, 294 F.2d 240, 244 (D.C. Cir. 1961).

Thus, Ashbacker poses no obstacle to the grant of any particular application – whether or not the opportunity to submit "mutually exclusive" applications has been afforded – as long as the means by which that grant is accomplished are reasonable and consistent with the public interest. *E.g., Cellular Mobile Systems of Pennsylvania, Inc. v. FCC* ("*CMS-PA*"), 782 F.2d 182, 197 (D.C. Cir. 1985) (citing *Ashbacker*, 326 U.S. at 333); *La Star Cellular Telephone Co. v. FCC*, 899 F.2d 1233, 1235 (D.C. Cir. 1990) (also citing *Ashbacker*, 326 U.S. at 333). *See also Reuters, Ltd. v. FCC*, 781 F.2d 946, 951 (D.C. Cir. 1986) ("*Ashbacker*'s teaching applies not to prospective applicants, but *only to parties whose applications have been declared mutually exclusive*." (emphasis in original)).

Such alternative procedural approaches can exclude both would-be mutually exclusive applications that had been filed as of the time of the grant and those that had not. While *Ashbacker* procedural protections are available to would-be applicants where such would-be applicants' failure to timely file was the result of unforeseeable agency action precluding such timely filing, *see Kessler v. FCC*, 326 F.2d 673 (D.C. Cir. 1963) (unannounced freeze on applications does not defeat previously established filing opportunity), the opportunity to file such applications can be removed, again assuming that certain factors are present.

The decision *Bachow Communications, Inc. v. FCC*, 237 F.3d 683 (D.C. Cir. 2001) is particularly instructive.

The *Bachow* Decision

In *Bachow*, the Commission was faced with a large and, apparently, growing volume of applications for authorizations in the 39 GHz band. The Commission decided to shift to an auction mechanism for resolving mutual exclusivities. To do so, the Commission announced an immediate freeze on further applications. It then divided the universe of applications pending as of the freeze announcement into several categories. Those filed more than 30 days prior to the freeze announcement which were not already subject to any mutually exclusive applications were deemed "ripe"; they were processed and granted (assuming all processing standards were satisfied).

The 30-day "ripeness" dividing line was arrived at by reference to Section 309(b) of the Communications Act, which precludes action on certain types of applications less than 30 days after public notice of the applications' acceptance for filing. The Commission reasoned that prospective applicants had enjoyed that statutory 30-day no-action period during which they could have prepared and submitted their applications. Having failed to avail themselves of that opportunity, such prospective applicants were not entitled to submit applications as of the

imposition of the freeze. Any applications already on file earlier than 30 days prior to the freeze and not otherwise subject to mutually exclusive applications could thus be granted consistent with *Ashbacker*.

As of the date of the freeze, the Commission's processing rules had permitted the filing of mutually exclusive applications for 39 GHz authorizations within 60 days of public notice of acceptance for filing. But the Commission concluded, several years after the freeze was imposed, that for "ripeness" purposes, a briefer 30-day period should be used. The D.C. Circuit affirmed: "The ripeness period quite sensibly guarantees that all applications that are granted were on public notice for the 30 days required by the Communications Act. See 47 U.S.C. §309(b)." 237 F.3d at 689. Thus, the Court approved the notion that, in implementing a change of processing standards, the Commission could permissibly reduce the eligibility period for competing applicants long after the fact, as long as the Commission had in fact afforded potential mutually exclusive applicants the 30 days required by the Act.

Summary of the *Ashbacker* Doctrine

The traditional articulation of the holding in *Ashbacker* is of extremely limited applicability outside of the narrow factual context of that case. As the *Ashbacker* decision itself indicated – and as subsequent decisions have demonstrated – the Commission has considerable latitude, acting pursuant to its broad public interest mandate, to fashion rules, procedures and policies (ad hoc or otherwise) designed to achieve proper regulatory goals even if, as a practical matter, such rules, procedures or policies preclude actual or potential competing applicants.

In fashioning such rules, procedures and policies, the Commission must first determine that the approach it is taking in fact advances some public interest consideration(s). Secondly, it must assure that potential competing applicants have had an adequate opportunity to file. As *Bachow* illustrates, such an adequate opportunity is afforded by the 30-day no-action period following public notice of the initial application's acceptance for filing specified in Section 309(b).

The WAY Application

In view of the foregoing analysis, WAY's modification application and associated waiver request can plainly be granted consistently with *Ashbacker*.

First, as detailed in WAY's waiver request, grant of the application would advance the public interest in several respects, most notably the improvement of AM service. The Commission has recognized the need to revitalize the AM band as a matter of particular importance for more than 20 years. *See, e.g., Amendment of Service and Eligibility Rules for FM Broadcast Translator Stations*, 24 FCC Rcd 9642 (2009); *Review of the Technical Assignment Criteria for the AM*

Broadcast Service, 5 FCC Rcd 4381 (1990); *Opening Remarks of FCC Commissioner Ajit Pai at Missouri Broadcasters Association Convention's AM Radio Revitalization Panel*, May 31, 2013. As WAY and Hancock have made abundantly clear in the waiver request, the goal of their application is to advance that precise interest.

Second, other potentially competing applications have had far more than the statutory minimum of 30 days within which to file. Public notice of the acceptance for filing of the WAY application was given on November 21, 2012 (*see* Broadcast Applications, Report No. 27869, released November 21, 2012, at 6), so prospective applicants knew that, thanks to Section 309(b), they could assure timely filing – and, thus, comparative consideration – if they filed by December 21, 2012. More than 200 days have passed since the public notice. No mutually exclusive applications have been filed. *Ashbacker*, as refined in *Bachow*, has been satisfied.

It does not matter that the WAY application proposes a change of channel to a channel not mutually exclusive with the translator's currently authorized channel. As noted in the waiver request included with the WAY application, the Commission has previously determined that channel substitutions – even substitutions for non-mutually exclusive channels – may be treated as minor changes, and applications for such changes can be deemed "minor changes" entitled to cut-off protection upon the filing of the application. *See 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, ¶16 (2006). That determination, of course, is just one of a number of instances in which the Commission has revised its processing rules in ways which limit arguable *Ashbacker* rights. Other such instances include the one-step upgrade process and change-of-community-of-license-by-application process.

In any event, the facilities proposed by WAY were fully set forth in the application, and public notice of the acceptance for filing of that application was duly given. Potential competitors were thus on notice of the application and the fact that the minimum 30-day holding period had begun. Under *Bachow*, the Commission may grant the WAY application consistently with *Ashbacker*.

Another alternative would be to follow the example set when the Commission began the proceeding that resulted in the rule permitting AM licensees to rebroadcast on FM translators. *See Amendment of Service and Eligibility Rules forFM Broadcast Translator Stations*, Notice of Proposed Rulemaking (NPRM), 22 FCC Rcd 15890, n. 19 (2007). There the Commission authorized the Media Bureau to permit such AM-on-FM-translator rebroadcasting on a special temporary authorization basis pending, and subject to, the conclusion of the rulemaking commenced with that NPRM.

Conclusion

In view of the foregoing, *Ashbacker* does not bar immediate grant of the WAY application.