

## **WAIVER REQUEST**

In connection with the submission of the instant application, Northeast Broadcasting Company, Inc. (“NEBCO”) requests that the Commission grant it a waiver of Section 74.1233(a)(1) of the Commission’s Rules, permitting the amendment of NEBCO’s application for a new FM translator station, by changing the output channel from Output Channel 243 to Output Channel 291. The basis for this request is that in order for NEBCO to be awarded a construction permit in Auction 83, without causing impermissible preclusion to potential LPFM applicants, it can only operate on Channel 291 and not on Channel 243, where it initially applied, or any other channel that would constitute a minor amendment under the provisions of Section 74.1233(a). Consequently, NEBCO submits that a waiver of the minor change only provisions of Section 74.1233(a) are properly in order and that the public interest will benefit thereby.

### **THE FACTS**

NEBCO’s single remaining application for an FM translator station in the Boston, Massachusetts Arbitron radio market, now proposes operation on Output Channel 243. In the Engineering Report provided by NEBCO’s engineering consultant, he details the results of the preclusion and other studies he has conducted in order to determine whether NEBCO’s long-pending application can be prosecuted to grant on Channel 243.

The conclusion, as it applies to the Boston spectrum limited market, is clear and disappointing. NEBCO’s application stands in conflict with the availability of spectrum for the submission of an LPFM application, either on Channel 243 or any other Output Channel that would represent a minor amendment to NEBCO’s pending application.

Moreover, the one other remaining FM Translator Auction 83 applicants for the Boston radio market (Market 10) also propose Output Channels that would preclude use by any LPFM applicant.<sup>1</sup> Consequently, no FM translator application, from Auction 83, can be granted based on a strict application of the Commission's Rules.

A waiver of the rules, permitting what would otherwise be deemed a major change to be treated as a minor change, will allow for the grant of NEBCO's FM Translator application on Channel 291D. As described in the attached Preclusion Study, the operation of NEBCO's FM translator, as provided for on Output Channel 291D, would not preclude future opportunities for a new LPFM station on Channels 290, 291, or 292 in the Boston radio market. Likewise, a grant of the application, allowing for operation on Channel 291D, would not create new overlap of contours with the one remaining FM translator applicant in the Boston market in the Auction 83 window. The NEBCO application, granted as described herein, would otherwise meet Commission requirements.

## **DISCUSSION**

A waiver of the rules, to allow amendment of NEBCO's Tech Box showing, from Channel 243 to Channel 291, will enable NEBCO to secure a grant of a construction permit, allowing fill-in operation for Station WXRV(FM), Andover, Massachusetts,<sup>2</sup> and will serve the best interests of WXRV and the Boston listening public. Accordingly, the public interest would be well served by allowing the waiver owing to the unique circumstances that NEBCO will

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<sup>1</sup> *Public Notice*, Media Bureau Announces April 1-April 19 Filing Window for FM Translator Auction 83 Preclusion Showings, DA 13-427, released March 14, 2013. The one other application is FCC File No. BNPFT-20030317JVQ.

<sup>2</sup> WXRV is licensed to Beanpot License Corp., which shares common ownership with NEBCO. NEBCO has itself been the licensee of WXRV.

present herein. On the basis of the unique circumstances presented and that the public interest is well-served by a waiver of the major change rule, NEBCO submits that it has overcome the high hurdle for waiver requests and is entitled to the waiver it is seeking. See *WAIT Radio v. FCC*, 418 F. 2d 1153, 1157 (D.C. Cir. 1969), cert denied, 409 U.S. 1027 (1972).

The unique circumstances that NEBCO relies on are as follows:

1. **No Other Available Channel.** As evidenced by the Engineering Report, there are no first, second, third adjacent channels or IF channels that NEBCO can amend to without causing or suffering impermissible interference to other stations or causing preclusion to future LPFM applicants. Were such channel available, NEBCO would have applied for it. Channel 291 is the only available channel where an FM translator application would not cause preclusion to future LPFM applicants. When presented with such situations, the Media Bureau has previously waived the major change rule.<sup>3</sup>

2. **NEBCO Has Waited Ten Years for An FM Translator Permit.** In 2003, more than 10 years ago, NEBCO filed its four applications for a new FM translator station in the Boston radio market. NEBCO filed no other FM translator applications, let alone the thousands that other parties submitted. All it sought and continues to seek is the ability to fill in the signal of WXRV so that it can be the operator of a more robust programming service to the listeners it has long served in the Boston radio market. Having waited for a decade to secure its first and only translator station and dismissed its three other applications, NEBCO should be entitled to receive a single FM translator construction permit where such a grant will not interfere with the development of the LPFM radio service.

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<sup>3</sup> See wavier granted in FCC File No. BPFT-20090430AAY.

3. **LPFM Development is Not Prevented By NEBCO's Waiver Request.** The Engineering Report shows that an FM translator station can be granted on Channel 291D without precluding new LPFM stations. Allowing both FM translator and LPFM stations to be granted, to the maximum extent possible, is consistent with the FCC's compliance with the terms of the Local Community Radio Act of 2010.<sup>4</sup> In *Creation of a Low Power Radio Service*, Fourth Report and Order and Third Order on Reconsideration, 27 FCC Rcd 3364, 3386 (2012), the Commission reasoned:

As such, we agree with NAB that translator applicants in 'spectrum limited' markets should be given an opportunity to demonstrate that their applications, if granted, would not preclude any LPFM opportunities....This approach is also consistent with our combined reading of Sections 5(1) and 5(2) because it furthers the statutory goal of ensuring that the Commission provide licensing opportunities for both services in as many communities as possible....As described below in more detail below, we will provide applicants with a limited opportunity to amend their applications so long as their proposals do not eliminate any LPFM channel/point combination in any of the 156 market grids and, where applicable, satisfy the Top 50 Market Preclusion Showing. We do not believe that allowing translator applicants these limited opportunities to amend their applications will impede our ability to guarantee licensing opportunities equivalent to the LPFM channel floors we adopt herein. (footnotes omitted).

4. **NEBCO Is The Only Party Proposing A Fill-In Translator.** A review of the Commission's database evidences that NEBCO is the only local broadcaster currently seeking an FM translator station in the Boston market. NEBCO has been the licensee or controlling party of the licensee of WXRV for more than 30 years. It has served the Boston community for more than three decades and seeks only to improve the broadcast service that the community has come to expect from the Station. NEBCO has been a local broadcaster and has furthered the same goals as the Commission expects from its LPFM service. It should be treated in the same manner as the proposed LPFM parties.

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<sup>4</sup> Pub. L. No. 111-371, 124 Stat. 4072 (2011).

5. **NEBCO Should Not Be Denied An Opportunity By A Constantly Evolving Set of Rules.** No one would disagree that the standards under which Auction 83 is now being administered are far different from what was intended in 2003 when the auction proceeding commenced. NEBCO has played by the rules and has taken not a single action at variance with them. It has followed the Commission rules and responded wherever called upon. After 10 years of waiting, if there is a basis for receiving what it applied for, it should be given that opportunity.

Unless the Commission grants the instant waiver, there may be an unintended and improper consequence of the application of these rules by the Commission. The Boston market may not have a single FM translator granted from Auction 83 despite the fact that there is an available channel that, if used for an FM translator, would not cause preclusion to new LPFM service. A waiver of the major change rule would allow the use of the limited, available broadcast spectrum to the maximum extent possible. It is clearly in the public interest.

NEBCO also wishes to make note that there is precedent for the granting of waivers of Section 74.1232(a). Only a short time ago, especially when compared to length of the Auction 83 proceeding, the Media Bureau, in *Letter to John F. Garziglia, Esq.*, 26 FCC Rcd 12685 (2011), granted a waiver of Section 74.1232(a). In that proceeding, the Media Bureau established requirements for a Section 74.1233(a) waiver where the applicant was proposing a relocation that did not involve a continued 60 dBu overlap. The Bureau set out the procedures whereby an existing FM translator station could qualify for a waiver. Among the elements of a showing needed to qualify for a waiver was that the modification would not “foreclose future licensing opportunities in the LPFM service.... *Id.* at p. 12688. If the major change limitation

can be waived for modifications, it can also be waived for new applicants, especially where LPFM licensing will not be detrimentally affected.

Finally, NEBCO wishes to note that the FCC already has in place procedures whereby it can stipulate non-adjacent channels for FM translator and other applicants. Section 74.1232(e)(2) provides:

Where applicants for FM translator stations are mutually exclusive and do not involve a proposal to provide fill-in service of commonly owned primary stations, the FCC may stipulate different frequencies as necessary for the applicants.

In addition, in the case of FM radio stations, the Media Bureau has what has been described as a “long-established policy of permitting full power stations to implement non-adjacent channel upgrades where there is a demonstration that another equivalent channel is available for other parties.” *Id.* at p. 12685, n. 5. Once again, the Commission has procedures to allow new FM translator and other facilities to be granted and should apply that here where a qualified party has waited more than a decade to secure a new FM translator station.

A waiver of Section 74.1232(a) is clearly in order so as to allow a new FM translator station to be granted in the Boston radio market where it will not otherwise preclude new LPFM service. On the basis of the unique circumstances presented and that the public interest is well-served by a waiver of the major change rule in order to permit NEBCO to obtain an FM translator station that it has sought for more than 10 years in order to serve its long-standing listening public. NEBCO clearly has overcome the high hurdle for waiver requests and is entitled to the waiver it is seeking.