



Federal Communications Commission
Washington, D.C. 20554

October 29, 2015

In Reply Refer to:
1800B3-MM

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In re: **Penfold Communications, Inc.**
K260BP, Irving, TX
Facility ID No. 14442

File Nos. BPFT-20110829AAU

Application for Minor Change

Informal Objection

Dear Counsel:

We have before us the above-referenced application for minor change (“Change Application”) filed by Penfold Communications, Inc. (“Penfold”) for FM translator K260BP, Irving, Texas (“Station”). We also have before us Bison Media, Inc.’s (“Bison”) October 1, 2011, informal objection (“Objection”) to the Change Application, and associated pleadings.¹ For the reasons set forth below, we deny the Objection and grant the Change Application.

Background. In 2010, Penfold submitted an application to change channels and effective radiated power (“Displacement Application”) due to interference complaints from a co-channel station.² Non-adjacent channel changes are not permitted outside a filing window,³ but we granted the application

¹ Penfold filed an Opposition to Objection on October 7, 2011; Bison filed a Reply to Opposition on October 20, 2011. Penfold filed a “Motion for Leave to File Response to ‘Reply to Opposition’” on October 27, 2011. This last pleading is unauthorized per Section 1.45 of the Commission’s Rules (“Rules”). Accordingly, we will not consider it. 47 C.F.R. § 1.45. *See, e.g., Fourteen Hundred, Inc.*, Letter, 15 FCC Rcd 4486, 4488 (MB 2010) (declining to consider unauthorized pleadings).

² *See* File No. BPFT-20101228ABM (requesting authority to change frequency from Channel 221 to 260).

³ 47 C.F.R. § 74.1233(a)(1).

pursuant to our displacement policy. Under this policy, we waive our processing rules on a case-by-case basis for displaced translators when the station's only alternative to major change is to cease broadcasting ("Displacement Policy").⁴ We granted the Displacement Application on March 3, 2011, and subsequently granted Penfold's application for a license to cover the facilities proposed in the Displacement Application.⁵ Penfold then filed the Change Application on August 29, 2011, seeking approval to move the Station's transmitter site approximately 22 kilometers southwest.⁶

Bison argues that we should revise the Displacement Policy and, after applying the revised policy, deny the Change Application, or designate it for hearing to determine whether its grant would violate *Ashbacker*, which generally prohibits the Commission from limiting eligibility to file competing applications.⁷ Specifically, Bison urges us to subject any subsequent applications filed by the licensee of a displaced FM translator to "great scrutiny" for adverse *Ashbacker* impact.⁸ Applying its proposed change, Bison argues that Penfold's two applications – the Displacement Application and the Change Application – are "serial applications" that represent an abuse of the Commission's processes and implicate *Ashbacker*. According to Bison, these applications do not meet the two-part test set forth in *Mattoon* under which the Division may take action to limit eligibility to file competing applications.⁹ Thus, Bison alleges that granting the Change Application would violate the due process requirements set forth in *Ashbacker*. Based on this, Bison argues that we should either deny the Change Application or designate it for hearing.¹⁰

⁴ 47 C.F.R. § 74.1233(a)(1) (listing types of applications that are major changes). An FM translator, as a secondary service, is required to suspend operations if it is causing interference to a full service FM station. 47 C.F.R. § 74.1203.

⁵ See *Broadcast Actions*, Public Notice, Report No. 47438 (Mar. 8, 2011) (granting Displacement Application); *Broadcast Actions*, Public Notice, Report No. 47467 (Apr. 18, 2011) (granting license to cover Displacement Application, File No. BLFT-20110405AAS).

⁶ File No. BPFT-20110829AAU, Exhibit 1 and Attachment 1.

⁷ Objection at 5-6, citing *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327 (1945) ("*Ashbacker*").

⁸ *Id.* at 5. Bison also urges us to revise the Displacement Policy to limit the selection of a new site for a displaced FM translator to a site within the translator's existing service area. Bison states that this would be consistent with the Commission's approach to LPFM displacement applications. See Objection at 2-3. The Commission has specified that an LPFM "displacement application may propose a station relocation and/or channel change to any available channel." *Creation of Low Power Radio Service*, Memorandum Opinion and Order on Reconsideration, 15 FCC Rcd 19208, 19235 ¶ 68 (2000). It treats an LPFM displacement application as a minor change "that is not subject to competing applications" provided that a requested LP100 station site change is not greater than 5.6 kilometers or, in the case of an LP10 station, 3.2 kilometer. *Id.* See also *Creation of a Low Power Radio Service, Third Report and Order and Second Further Notice of Proposed Rulemaking*, 22 FCC Rcd 21912, 21956 (2007) (revising the distance limitations for transmitter site relocations set forth in Section 73.870(a) of the Commission's rules).

⁹ *W263AQ, Mattoon, IL*, Letter, 26 FCC Rcd 12685 (MB 2011) (The Division may properly take actions which may limit eligibility to file competing applications where changes are technical and minor and "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'") ("*Mattoon*").

¹⁰ Objection at 4, citing *Mattoon*.

Penfold contends that it filed the Displacement Application due to unforeseen interference to a co-channel station, and it filed the Change Application because Bison's translators were causing interference to the Station.¹¹ Penfold asserts that *Mattoon* is unrelated to this proceeding because in that case, the applicant sought grant of a change application which, absent a waiver, would have been a major change.¹²

Discussion. Under Section 309(d) of the Communications Act of 1934, as amended ("Act"),¹³ informal objections, like petitions to deny, must provide properly supported allegations of fact that, if true, would establish a substantial and material question of fact that grant of the application would be *prima facie* inconsistent with the public interest, convenience and necessity.¹⁴ Here, Bison has not met this burden.

Bison asks us to revise the Displacement Policy such that we will "examine with great scrutiny for adverse *Ashbacker* impact any subsequent permit application filed by that translator licensee until the close of the next FM translator filing window following the issuance of the displacement permit."¹⁵ We decline to revise our Displacement Policy here because adjudication is not the appropriate place for a larger scale discussion of policy issues.¹⁶ It has "long been Commission practice to make decisions that alter fundamental components of broadly applicable regulatory schemes in the context of rulemaking proceedings, not adjudications."¹⁷

We do, however, consider Bison's argument that the Change Application violates the due process requirements set forth in *Ashbacker*. The premise of Bison's *Ashbacker* argument is that the Displacement Application and the Change Application are "serial applications."¹⁸ We have a policy against certain serial filings because they can abuse our licensing procedures, namely, when applicants intentionally engage in a filing behavior designed to evade rule restrictions.¹⁹ Here, where the first

¹¹ Opposition at 2. Penfold is referring to three translators that the Commission authorized Bison to operate pursuant to special temporary authority to overcome interference from foreign stations. *See* File Nos. BSTA-20080715ACH, BSTA-20080715ACK, BSTA-20080715ACM. *See also* File No. BSTA-20090729AER (granted Nov. 9, 2009) (seeking to change translator's authorized frequency to facilitate simultaneous operation of translator group). Penfold objected to – and Bison opposed – an extension of special temporary authority to operate this translator (File No. BELSTA-20100506AEV). *See* Informal Objection filed against File No. BESTA-20100506AEV on Jun. 27, 2011. We will answer the interference claim in an order addressing this informal objection.

¹² Opposition at 3.

¹³ 47 U.S.C. § 309(d).

¹⁴ *See, e.g., WWOR-TV, Inc.*, Memorandum Opinion and Order, 6 FCC Rcd 193, 197 n.10 (1990), *aff'd sub nom. Garden State Broadcasting L.P. v. FCC*, 996 F.2d 386 (D.C. Cir. 1993), *reh'g denied* (Sept. 10, 1993); *Area Christian Television, Inc.*, Memorandum Opinion and Order, 60 RR 2d 862, 864 (1986) (informal objection must contain adequate and specific factual allegations sufficient to warrant the relief requested).

¹⁵ Objection at 5.

¹⁶ As noted *supra* note 8, Bison seeks an additional change to the Displacement Policy. We also decline to make this change.

¹⁷ *See, e.g., Sunburst Media L.P.*, Memorandum Opinion and Order, 17 FCC Rcd 1366, 1368 ¶ 6 (2002). *See also Community Television of Southern California v. Gottfried*, 459 U.S. 498, 511 (1983) ("rulemaking is generally better, fairer, and more effective method of implementing a new industry wide policy than the uneven application of conditions in isolated [adjudicatory] proceedings").

¹⁸ *Mattoon*, 26 FCC Rcd at 12687.

¹⁹ *FM Translator K221FQ*, Letter, 27 FCC Rcd 5955, 5957 (2012).

application at issue involved the translator's displacement, we do not have abuse of process concerns. Displacement arises from circumstances outside a translator licensee's control. Because we will not license a translator if it will cause interference when it commences operations, a translator licensee generally cannot manufacture its own displacement claim. Accordingly, we reject the argument that we should give the Change Application closer scrutiny here. Having rejected the premise underlying Bison's *Ashbacker* argument, we do not address it further.

Conclusion. Accordingly, IT IS ORDERED that the informal objection filed by Bison Media, Inc., on October 1, 2011, IS DENIED.

IT IS FURTHER ORDERED that the application of Penfold Communications, Inc. for a minor modification of facilities for Station K260BP, Irving, Texas (File No. BPFT-20110829AAU) IS GRANTED.

Sincerely,

A handwritten signature in blue ink that reads "Peter H. Doyle" followed by the initials "TH" in a smaller, slanted font.

Peter H. Doyle
Chief, Audio Division
Media Bureau