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In re: **Educational Media Foundation**
W267AT, Oneonta, New York
Facility ID No. 140739
File No. BPFT-20130416AAG

Petition for Reconsideration

Dear Counsel:

We have before us a Petition for Reconsideration ("Petition") filed by Educational Media Foundation ("EMF"). The Petition challenges a letter dated June 10, 2013,[1] which denied a request for waiver of Section 74.1233(a)(1) of the Commission's Rules ("Rules")[2] filed by EMF and dismissed the above-referenced application ("Application") to modify the facilities of W267AT, Oneonta, New York ("Station"). For the reasons discussed below, we deny the Petition.

Background. EMF filed the Application on April 16, 2013. A request for waiver of Section 74.1233(a)(1) of the Rules accompanied the Application. EMF included the waiver request because its proposal to move the Station's transmitter to a new site did not qualify as a minor change under Section 74.1233(a)(1) of the Rules, which requires the 60 dBu contours of a Station's existing and proposed facilities to overlap. EMF maintained that waiver of Section 74.1233(a)(1) would be in the public interest and would be consistent with precedent. EMF cited our *Mattoon* decision, in which we granted a waiver of Section 74.1233(a)(1) to another translator.[3] EMF argued that it satisfied each of the four criteria set forth in *Mattoon* and thus that we should grant its waiver request.

In the *Letter Decision* we denied EMF's request and dismissed the Application. We concluded that EMF did not satisfy the fourth *Mattoon* criterion because EMF did not propose to operate the Station as a fill-in translator for an AM station.

EMF challenges this decision. EMF disputes our reading of *Mattoon*, arguing that to satisfy the fourth *Mattoon* criterion a translator need not propose fill-in service. EMF then asserts that to satisfy the

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[1] *Letter to Education Media Foundation from James D. Bradshaw, Deputy Chief, Audio Division, Media Bureau* (dated June 10, 2013) ("*Letter Decision*")

[2] 47 C.F.R. § 74.1233(a)(1).

[3] *Cromwell Group, Inc.*, Letter, 26 FCC Rcd 12685 (2011) ("*Mattoon*").

fourth *Mattoon* criterion an applicant simply must demonstrate that the proposed move "would serve the public interest."[4]

Discussion. We have previously waived Section 74.1223(a)(1) where an applicant has demonstrated that: (1) it does not have a history of filing "serial" minor modification applications; (2) the proposed facility is mutually exclusive to its licensed facility; (3) the proposed move would not foreclose future licensing opportunities in the LPFM service in certain markets, and (4) while not alone dispositive, the translator will rebroadcast an AM station as an AM fill-in translator.[5]

We agree with EMF that the *Letter Decision* incorrectly describes the fourth *Mattoon* criterion as focusing upon whether a translator will provide fill-in service. However, we find EMF's proposed interpretation of that criterion to be too broad.[6] In setting out the fourth *Mattoon* criterion, we actually emphasized the fact that the applicant sought to rebroadcast an AM – as opposed to an FM – station.[7] Specifically, we noted that "[i]n 2009, the Commission authorized the use of certain FM translators to rebroadcast the signal of a local AM station." We went on to explain that our grant of waiver was "consistent with our continued efforts to revitalize the AM service and to make the most efficient use of limited spectrum." Because EMF proposes to rebroadcast the signal of an FM station, it cannot satisfy the fourth *Mattoon* criterion.[8] Thus, while we disagree with the reasoning set forth in the *Letter Decision*, we affirm the actions taken therein.

Conclusion/Actions. For the reasons set forth above, IT IS ORDERED, that the Petition for Reconsideration filed by Educational Media Foundation on July 15, 2013, IS DENIED.

Sincerely,

Peter H. Doyle
Chief, Audio Division
Media Bureau

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[4] Petition at 3.

[5] *Mattoon*, 26 FCC Rcd at 12686. *See also Perry Broadcasting Co., Inc.*, Letter, 27 FCC Rcd 5955 (MB 2012).

[6] Indeed, were we to interpret the fourth *Mattoon* criterion as broadly as EMF advocates, we believe we would run afoul of *NetworkIP, LLC v. FCC*, 548 F.3d 116, 125-128 (D.C. Cir. 2008). Therein, the U.S. Court of Appeals for the District of Columbia found that waiver of the Commission's Rules is appropriate only if such deviation will serve the public interest *and* special circumstances warrant a deviation from the general rule.

[7] The Commission's Rules require that translators rebroadcasting the signals of AM stations be fill-in. *See Amendment of Service and Eligibility Rules for FM Broadcast Translator Stations*, Report and Order, 24 FCC Rcd 9642, 9650 (2009). The fill-in nature of these translators, however, was not the focus of our analysis in *Mattoon*.

[8] While EMF asserts that, "[i]n many cases," we have granted *Mattoon* waivers to translators proposing to rebroadcast FM stations, it cites only one instance in which we have granted an application filed by a translator proposing to rebroadcast the signal of an FM station that included a request for a *Mattoon* waiver. *See* Petition at 3, n. 5. We acknowledge that we did grant the application that EMF cites. However, we note that such grant occurred via public notice and did not discuss the waiver request. It is well established that such a decision does not constitute binding precedent. 47 C.F.R. § 0.445(e). Further, we conclude that our grant of that application was in error. However, that grant is final and cannot be rescinded.