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In re: **W262CY, Cleveland, Ohio**
Facility ID No. 145205
File Nos. BMPFT-20160729ANY
BMPFT-20170213ABQ

W260CY, Cleveland, Ohio
Facility ID No. 143930
File Nos. BMPFT-20160729ANZ
BMPFT-20170213ABO

**Petitions for Reconsideration
Informal Objections**

Dear Counsel:

We have before us two Petitions for Reconsideration (Petitions) filed by Media-Com, Inc. (Media-Com) on October 7, 2016, seeking reconsideration of the September 9, 2016, grants of the above-referenced modification applications (Modification Applications) of Caron Broadcasting, Inc. (Caron) and Common Ground Broadcasting, Inc. (Common Ground).¹ On February 13, 2017, Caron and Common Ground filed applications for minor changes to their construction permits, each identifying a new site less than a mile from the site originally specified in the Modification Applications (Site Change Applications).² For the reasons stated below, we grant the Petitions and Site Modification Informal Objections, rescind grant of the Modification Applications, and dismiss the Modification Applications and Site Change Applications (collectively, Applications) under Section 74.1204(f) of the Commission's Rules.³

¹ File Nos. BMFT-20160729ANY and BMPFT-20160729ANZ (filed by Caron and Common Ground, respectively, both on July 29, 2016). See *Broadcast Applications*, Public Notice, Report No. 28924 (Feb. 16, 2017). Media-Com is the licensee of station WNIR(FM), Kent, Ohio (WNIR), which operates on Channel 261, a first adjacent channel to both proposed facilities. On October 20, 2016, Caron and Common Ground each filed an opposition to the Petitions (Reconsideration Oppositions). On October 26, 2016, Media-Com filed replies to the Reconsideration Oppositions (Reconsideration Replies). Because Caron and Common Ground are commonly owned, propose nearly identical technical facilities, are subject to the same objections by Media-Com, and raise the same arguments in reply, we will consider their pleadings together.

² File Nos. BMPFT-20170213ABQ and BMPFT-20170213ABO (filed by Caron and Common Ground, respectively, both on February 13, 2017). On February 23, 2017, Media-Com filed informal objections to the Site Change Applications (Site Change Informal Objections). On March 9, 2017, Caron and Common Ground each filed an opposition to the Site Change Informal Objections (Site Change Oppositions). On March 16, 2017, Media-Com filed replies to the Site Change Oppositions (Site Change Replies).

³ 47 CFR § 74.1204(f) (Section 74.1204(f)).

Background. On July 29, 2016, Caron and Common Ground filed the Modification Applications, in which they proposed to: (1) relocate the transmitter sites of FM translator stations W262CY and W260CY (Translators) to downtown Cleveland, Ohio; (2) change the Translators' communities of license from Battle Creek, Michigan (W262CY), and Angola, Indiana (W260CY), to Cleveland, Ohio; and (3) change the Translators' operating frequencies from Channel 263 to Channel 262 (W262CY) and from Channel 256 to Channel 260 (W260CY).⁴ Acceptance for filing of the Modification Applications was announced by public notice on August 3, 2016.⁵ On September 8, 2016, Caron and Common Ground filed engineering amendments to the Modification Applications, providing additional channel protection data.⁶ The engineering amendments were placed on public notice on September 13, 2016.⁷ The Modification Applications were granted on September 9, 2016, which was announced by public notice on September 14, 2016.⁸ Media-Com did not file informal objections to the Modification Applications prior to grant. On October 7, 2016, Media-Com timely filed the Petitions. On February 13, 2017, Caron filed the Site Change Applications, which Media-Com opposed on the same grounds as the Petitions.

In the Petitions and Site Change Informal Objections, Media-Com contends that grant of the Modification Applications should be rescinded and all four Applications dismissed under Section 74.1204(f) of the Rules, which provides that an application for an FM translator station will not be accepted for filing even if the proposed operation would not involve prohibited contour overlap if the predicted 1 mV/m field strength contour will overlap a "regularly used, off-the-air signal" of a co-channel, first, second, or third adjacent channel broadcast station, and grant of the authorization will result in interference to the reception of such signal.⁹ In support of its argument, Media-Com submits 54 statements by regular WNIR listeners, made under penalty of perjury, as well as a contour map that plots the locations of these listeners within the 60 dB μ (1mV/m) signal contours proposed in the Applications.¹⁰

In the Reconsideration Oppositions, Caron and Common Ground argue that the Petitions are procedurally unacceptable because Media-Com did not object to the Modification Applications prior to grant.¹¹ Consideration of the Petitions, according to Caron and Common Ground, would "make all [250-mile modification] applications vulnerable indefinitely."¹² On the merits, Caron and Common Ground do not address Media-Com's Section 74.1204(f) argument, but argue that Media-Com failed to show actual interference under Section 74.1203(a) and state that the Applications comply with the contour overlap provisions of Section 74.1204(a).¹³ Caron and Common Ground also allege that Media-Com "attempts to

⁴ The Modification Applications were filed pursuant to the AM Revitalization proceeding, which allowed AM licensees to relocate one non-reserved band FM translator station up to 250 miles. *See Media Bureau Announces Filing Dates and Procedures for AM Station Filing Window for FM Translator Modifications and Availability of FM Translator Technical Tools*, Public Notice, 30 FCC Rcd 14690, 14690-91 (MB 2015).

⁵ *Broadcast Applications*, Public Notice, Report No. 28790 (Aug. 3, 2016).

⁶ *See* Modification Applications, Exh. 1.

⁷ *Broadcast Applications*, Public Notice, Report No. 28818 (MB Sept. 13, 2016).

⁸ *Broadcast Actions*, Public Notice, Report No. 48819 (MB Sept. 14, 2016).

⁹ Media-Com also argues that the Site Change Applications should be dismissed under Section 74.1203(a) of the Rules, which prohibits a translator station from causing actual interference to any broadcast station. Petitions at 4-6; Site Change Informal Objections at 4-6 (citing 47 CFR § 74.1203(a)). Because we dismiss the Applications under Section 74.1204(f), we need not reach this argument.

¹⁰ Petitions, Exhs. A,B; Site Change Informal Objections, Exhs. A, B; Reconsideration Reply at 5.

¹¹ Reconsideration Oppositions at 1-2 (citing 47 CFR § 1.106(b)(1)).

¹² Modification Oppositions at 2.

¹³ Site Change Oppositions at 2; Reconsideration Oppositions at 3-4 (citing 47 CFR §§ 74.1203(a), 74.1204(a)).

protect service which is well outside its normal Class A FM service area and at least one of the alleged recipients of interference is outside the WNIR service contour and outside normal Class A FM service area.”¹⁴ Finally, Caron claims that grant of the Site Change Applications, taken together, would provide service to “over 1.1 million” people and further the objectives of the AM Revitalization proceeding.¹⁵

In reply, Media-Com argues that its failure to participate earlier in the proceeding was justified by the fact that the Modification Applications were granted on September 9, 2016, four days before the September 13, 2016, public notice of the acceptance for filing of the last amendments to the Modification Applications.¹⁶ Media-Com also cites as a “unique factor” the notice issues presented by applications involving 250-mile relocations, which require would-be objectors to go to “extraordinary lengths” of due diligence in a relatively short time frame.¹⁷

On the merits, Media-Com contends that Section 74.1204(f) does not require a showing of actual interference.¹⁸ Rather, according to Media-Com, the purpose of Section 74.1204(f) is to *prevent* such disruption from occurring in cases where translator construction would demonstrably affect listeners of a full service station.¹⁹ Media-Com also argues that whether or not the affected listeners are located within the full service station’s 60 dB μ contour is irrelevant to the Section 74.1204(f) analysis.²⁰ Media-Com asserts that dismissal of the Applications would not, as a practical matter, deny service to “over a million” listeners, because primary stations WHK and WHKW are large, robust stations with extensive signal coverage in the AM band.²¹ In this respect, Media-Com argues that Caron and Common Ground have “made no case that adding a small, duplicate FM coverage area to a booming AM Class B signal so advances the public interest that it warrants the emaciation of an existing FM local services . . . [but] merely want[] to provide a duplicate source of listening over the FM band . . .”²² Finally, Media-Com suggests that Caron and Common Ground’s disclosure that the “permittees could not reach a lease agreement to construct the translator stations at the transmitter site authorized in the [Modification Applications] construction permits” raises candor and reasonable assurance of site availability issues.²³

Discussion. Procedural issues. The Commission will consider a petition for reconsideration only when the petitioner shows either a material error in the Commission's original order or raises additional facts not known or existing at the time of the petitioner's last opportunity to present such matters.²⁴ Although a petitioner who is not a party to the proceeding generally must state with particularity the manner in which its interests are adversely affected by the action taken and show good reason why it was not possible to participate in the earlier stages of the proceeding,²⁵ Section 1.106(c)(2) of the Rules

¹⁴ Site Change Oppositions at 2.

¹⁵ Site Change Oppositions at 2, 4; Reconsideration Oppositions at 4.

¹⁶ Reconsideration Replies at 2-5.

¹⁷ Reconsideration Replies at 2-5.

¹⁸ Reconsideration Replies at 2-4; Site Change Replies at 2-5.

¹⁹ Reconsideration Replies at 6-7.

²⁰ Site Change Replies at 4-5.

²¹ Site Change Replies at 6-7.

²² Site Change Replies at 7.

²³ Site Change Replies at 8-9.

²⁴ See 47 C.F.R. § 1.106(c),(d); see also *WWIZ, Inc.*, Memorandum Opinion and Order, 37 FCC 685, 686 (1964).

²⁵ 47 CFR § 1.106(b)(1).

permits the Bureau to consider a petition for reconsideration if it determines that “consideration of the facts or arguments relied on is required in the public interest.”²⁶

An informal objection may be filed at any time prior to action the subject application²⁷ and must, pursuant to Section 309(e) of the Communications Act, provide properly supported allegations of fact which, if true, would establish a substantial and material question of fact regarding whether grant of the application in question would be consistent with the public interest, convenience and necessity.²⁸ In this case, the Informal Objections must establish a substantial and material question of fact that grant of the Site Change Applications would be inconsistent with Section 74.1204(f) of the Rules.

Although the Commission has afforded reconsideration to petitioners where the grant of an application occurred shortly after the application was filed, thus “effectively precluding” participation in the proceeding, we find that in this case Media-Com had adequate time to object to the Modification Applications prior to grant.²⁹ The Modification Applications were granted 37 days from the public notice of their acceptance for filing. In comparison, the Commission has found that 31 days is adequate time to object to an application.³⁰ We find that amendments to the Modification Applications filed on September 8, 2016, were not relevant to Media-Com’s arguments and thus had no practical impact on its ability to object to the Modification Applications as originally filed. Therefore, we find that Media-Com was not “effectively precluded” from objecting to the Modification Applications under our case law regarding the expeditious grant of applications.³¹

However, we find that it would be in the public interest to exercise our discretion to consider the Petitions under Section 1.106(c)(2) of the Rules. We note that the proposed transmitter site changes involve moves of a considerable distance and that the issue of whether the Translators’ proposed site would cause interference to listeners of WNIR was raised in a timely petition for reconsideration. The filing procedures announced in the *AM Revitalization Order*, under which an FM translator station licensee may take advantage of a one-time 250-mile site change modification opportunity, are unique, and review of the information included with the Petitions would facilitate resolution of this case on a more complete and accurate record.³² We disagree with Caron and Common Ground that such consideration will “make all [250-mile modification] applications vulnerable indefinitely.” Rather, Commission action on such modification applications becomes final after the 30 days for filing petitions for reconsideration provided by Section 1.106(f).³³ We therefore find that the public interest is served in this unusual circumstance by giving the objecting station an opportunity to avail itself of the interference protections afforded to local full service stations by Section 73.1204(f).

²⁶ 47 CFR § 1.106(c)(2).

²⁷ 47 CFR § 73.3587.

²⁸ See, e.g., *WWOR-TV, Inc.*, Memorandum Opinion and Order, 6 FCC Rcd 193, 197 n.10 (1990); *Area Christian Television, Inc.*, Memorandum Opinion and Order, 60 RR 2d 862, 864 (1986).

²⁹ See *Ted and Jana Tucker*, Memorandum Opinion and Order, 4 FCC Rcd 2816, 2816 (1989) (standing to file a petition for reconsideration found when application granted four days after public notice issued); *Aspen FM, Inc.*, Memorandum Opinion and Order, 12 FCC Rcd 17852, 17854-55 (1997).

³⁰ See *Association for Community Education*, Memorandum Opinion and Order, 19 FCC Rcd 12682, 12684 (2004).

³¹ This conclusion is without prejudice to our consideration of objections that are specifically based on information included in an amendment. In such cases, we may find that, due to the nature of the objection, the objector was effectively precluded from participation due to expeditious disposal of the application at issue.

³² See, e.g., *Nevada-Utah Conference of Seventh-Day Adventists*, Letter, 26 FCC Rcd 15135, 15137 (MB 2011) (considering additional evidence raised in a petition for reconsideration is in the public interest).

³³ 47 CFR § 1.106(f).

Substantive issue. On review of the record, we find that Media-Com has adequately substantiated its Section 74.1204(f) claim. In promulgating Section 74.1204(f), the Commission stated that it “will not grant an application if an objecting party provides convincing evidence that the proposed translator station would be likely to interfere with the reception of a regularly received off-the-air existing service, even if there is no predicted overlap.”³⁴ To provide “convincing evidence” under Section 74.1204(f) that grant of the translator construction permit “will result in interference to the reception” of an existing full-service station, an opponent must provide, at a minimum: (1) the name and specific address of each listener for which it claims credit; (2) some demonstration that the address of each purported listener falls within the 60 dB μ contour of the proposed translator station; (3) some evidence, such as a declaration from each of the claimed listeners, that the person, in fact, listens to the full-service station at the specified location; and (4) evidence that grant of the authorization will result in interference to the reception of the “desired” station at that location.³⁵ The Commission has stated that “[t]he best method, of course, is to plot the specific addresses on a map depicting the translator station's 60 dB μ contour.”³⁶ Here, Media-Com has followed this protocol by submitting documentation from listeners certifying that they are regular listeners of WNIR, either at home or at work, and plotting the specific addresses on a map depicting the Translators’ 60 dB μ contour. Media-Com has also demonstrated that grant of the Modification Applications results in interference to those listeners.³⁷ Because we find that Media-Com’s engineering exhibits have demonstrated that there are WNIR listeners within the proposed 60 dB μ contour of the Translators, we will rescind the grant of the Modification Application and dismiss the Modification Applications and Site Change Applications under Section 74.1204(f).

We do not find any merit to Media-Com’s “reasonable assurance of site availability” argument. While an applicant seeking a new broadcast facility must, in good faith, possess reasonable assurance of the availability of a transmitter site at the time it files its application, this standard is satisfied by “[s]ome clear indication from the landowner that he is amenable to entering into a future arrangement with the applicant for use of the property as its transmitter site, on terms to be negotiated”³⁸ We find that Caron and Common Ground’s statements that they were required to move the Translators’ transmitter sites due to an inability to finalize a lease agreement, without more, does not establish that Caron and Common Ground lacked reasonable assurance of site availability at the time they filed the Modification Applications.

Conclusion/Actions. For these reasons, IT IS ORDERED that the Petitions for Reconsideration filed by Media-Com, Inc. on October 7, 2016, and Informal Objections filed by Media-Com, Inc. on February 23, 2017, ARE GRANTED.

IT IS FURTHER ORDERED that the grant of the Modification Applications (File Nos. BMPFT-20160729ANY and BMPFT-20160729ANZ) IS RESCINDED, and the Modification Applications ARE DISMISSED.

³⁴ See *The Association for Community Education, Inc.*, Memorandum Opinion and Order, 19 FCC Rcd 12682, 12685-6 (2004) (*Community Education*) (citing *Amendment of Part 74 of the Commission's Rules Concerning FM Translator Stations*, Report and Order, 5 FCC Rcd 7212, 7230 (1990)).

³⁵ *Community Education*, 19 FCC Rcd at 12687.

³⁶ *Id.* n.30.

³⁷ Site Change Informal Objections, Exh. A, Fig. 1.0.

³⁸ *Elijah Broadcasting Corp.*, Memorandum Opinion and Order, 5 FCC Rcd 5350, 5351 (1990); see also, e.g., *Port Huron Family Radio, Inc.*, Decision, 66 RR 2d 545 (1989); *Radio Delaware, Inc.*, Memorandum Opinion and Order, 67 RR 2d 358 (1989).

IT IS FURTHER ORDERED that the Site Change Applications (File Nos. BMPFT-20170213ABQ and BMPFT-20170213ABO) ARE DISMISSED.

Sincerely,

Peter H. Doyle
Chief, Audio Division
Media Bureau