ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In re	)	
	)	
Application of Hope Christian Church	)	
of Marlton, Inc., for Modification	)	File No. BPFT-20140716AFP
of Facilities of FM Translator	)	Facility ID No. 141522
Station W289AZ, Trenton, NJ	)	
	)	

To: Marlene H. Dortch, Secretary

Attention: The Commission

APPLICATION FOR REVIEW

Hope Christian Church of Marlton, Inc. ("Hope"), by its counsel and pursuant to Section 1.115 of the Federal Communication Commission's rules, hereby respectfully submits its application for review of the Mass Media Bureau Audio Division's *Letter Ruling* dated October 22, 2014, denying the above-captioned modification application, DA 14-1524 (the "Staff Letter"). The Staff Letter is "in conflict with statute, regulation, case precedent [and] established Commission policy," Section 1.115(b) (2)(i), and involves a question of law or policy which has not previously been resolved by the Commission. Section 1.115(b)(2)(ii). The Staff's action was arbitrary and capricious. The Staff failed to give any notice to Hope or similarly-situated translator licensees of the change in definition of the allegedly prohibited behavior which doomed Hope's application. For all those reasons and those stated below, the Commission should reverse the action taken in the Staff Letter and grant the modification application.

1. BACKGROUND

The facts here are simple and mostly uncontested. Hope proposes to move W289AZ's transmitter 25 kilometers to a site at which its 60 dBu contour would not overlap with the 60 dBu contour of the translator's existing facilities. While this would technically constitute an impermissible "major change" under Section 74.1233(c) (i) of the rules, Hope requests a waiver of that rule. The waiver would be based on the Staff's grant of a "*Mattoon* Waiver" in *John F. Garziglia, Esq.*, 26 FCC Rcd. 2685 (Mass Media Bureau 2011).

In *Garziglia*, the Staff concluded that a waiver was warranted where the applicant (1) did not have a history of filing ***serial*** minor modification application***s***; (2) the proposed site was materially exclusive to the licensed, existing facility; (3) the proposed move did not adversely affect LPFM allocation needs; and (4) while not alone dispositive, the translator would be rebroadcasting an AM station. At 12686.

The modification application *met each one of these four tests*. The Staff did not contest this, except, inexplicably, as to the ban on prior serial modifications. No party objected to the modification application. Yet, the Staff Letter denied the modification application emphatically. Not satisfied with a mere denial, the Staff Letter went further, holding that Hope had abused the FCC's processes by attempting to "manipulate the Commission's modification and waiver policies." (At 3). The Staff's sole justification for this serious charge was the filing of an April 2014 modification application by Hope prior to the filing of the instant modification application. The Staff Letter found that the April application made "evident" Hope's allegedly nefarious purpose. And Hope had failed to "provide any information to the contrary." (At 3). For example, Hope had failed to make a showing regarding the "lack or unavailability of existing translators in the proposed area." (At 3).

2. ARGUMENT

Hope had only the Staff's previous articulation of the *Mattoon* Waiver in *Garziglia* to work with in preparing its modification application. That decision never suggested that a ***single*** *application (as opposed to "serial applications")*[1/] might be deemed to constitute improper "manipulation." It is therefore impossible to see how the Staff could fault Hope for not addressing the notion that a ***single*** application it had previously filed might be deemed a disqualifying manipulation. It is concededly not unreasonable for the Staff to expect waiver seekers to provide information responsive to previously announced waiver policies. But, if the Staff moves the goalposts by creating new, different policies on the fly in unpredictable ways – for instance, by deeming a ***single*** application to constitute "serial applications" – then holding the applicant responsible for its failure to predict the unpredictable is arbitrary and capricious agency conduct.

This Staff's flawed approach was compounded in the instant case by the Staff Letter's unsupported assertion about Hope's failure to provide "information." The Staff held that it was Hope's obligation to "provide [mostly unspecified] information" to negate the apparent presumption based on a ***single*** modification application that Hope had abused process. The Staff cites no precedent for application of this presumption, nor could it. Likewise, Hope is not aware of any support for the Staff Letter's declaration that Hope should have proffered a showing that existing translators were "unavailable" or not extant in the proposed service area. (At 3). Where did this burdensome and onerous duty arise from?

These invented, unprecedented FCC requirements were imposed with no notice. Worse, they are substantively absurd and illogical. In order to meet the Staff Letter's novel

[1] "Serial" means relating to, consisting of, or arranged in a series or performing a series of similar acts over a period of time. *Merriam Webster Dictionary*. *See* www.merriam-webster.com/dictionary/serial.

requirements, the applicant would have had to prove a negative. That is, the Staff appears to have expected Hope to demonstrate conclusively that the purpose ("evident" or otherwise) of the April application was not to "manipulate" the Staff's policies. Since the Staff appears to have already concluded that the mere fact that the April move was in the same direction as the instant one revealed the move's "evident purpose," it is difficult to imagine how Hope could have convinced the Staff otherwise. The bottom line: the record does not contain a scintilla of evidence that either of Hope's site moves violated Commission policy in any way.

3. LEGAL PRINCIPLES

The Staff had broad discretion to create and later to tweak its *Mattoon* Policy, but the Administrative Procedure Act and judicial decisions place boundaries on how the Staff may do so.

First and foremost, adequate notice is essential to enforcement. The D.C. Circuit has reiterated again and again that the "*quid pro quo* for stringent ... criteria is explicit notice of all application requirements." *Salzer v. FCC*, 778 F.2d 869, 872 (D.C. Cir. 1985). "When the sanction is dismissal ..., elemental fairness compels clarity in the notice required ...." *Id. See also Radio Athens, Inc., (WATH) v. FCC*, 401 F.2d 402, 409 (D.C. Cir. 1968); *Bamford v. FCC*, 535 F.2d 78, 82 (D.C. Cir. 1976). The Commission must make itself crystal clear or it cannot deliver a fatal blow to an applicant. *St. Vrain Communications Co. v. FCC*, 75 RR 2d 114 (D.C. Cir. 1994). *See also Communications and Control, Inc. v. FCC*, 33 CR 344 (D.C. Cir. 2004) (rejecting FCC action dismissing application when Commission had practice of permitting minor typographical errors which it departed from without explanation, noting that if the FCC "changes course, it must supply a 'reasoned analysis'", citing the *Administrative Procedure Act*, 5 U.S.C. § 706(2) (A).

Judicial precedent also undermines the Staff's thinly-supported argument that Hope was an abuser of process. The legally disqualifying label of abuse of process is applied *only* where the Commission can make a "specific showing of improper motivation." *Garden State Broadcasting, LP v. FCC, 996 F. 2d F. 2d 386 (DC Cir. 1993).* Abuse of process is "serious willful misconduct that directly threatens the integrity of the Commission's licensing process." *Saga Communications of New England, Inc.*, 19 FCC Rcd. 2741, 2745 (Chief, Enforcement Bureau 2004).

In the instant case, Hope had no notice whatsoever of the Staff's radical and unprecedented change of course, dramatically limiting the utility of the *Mattoon* Waiver for its intended beneficiaries (*e.g.*, AM's). Hope could not have abused rules of process of which it was not aware. Punishing Hope for its ignorance constitutes administrative arbitrariness by the FCC which the courts will never sanction. Going beyond denial of a modification application to reach an unjustified conclusion of unlawful abuse of process is a "reach" the Staff has not and cannot defend. The Commission should strike down the Staff's ill-advised decision.

4. CONCLUSION

The rule of law applies to the regulator as well as the regulatee. The Staff Letter does not uphold this principle; it denigrates it. The Staff Letter should be rejected and reversed. Hope's instant modification application should be granted expeditiously.

Respectfully submitted,

HOPE CHRISTIAN CHURCH OF MARLTON, INC.

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November 12, 2014

CERTIFICATE OF SERVICE

I, Sandi Kempton, do hereby certify that I have, this 12th day of November, 2014, caused copies of the foregoing "Application for Review" to be hand-delivered and sent via e-mail, to the following:

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