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In re: K258AO, Midland, TX
Facility ID No. 18340
File No. BMPFT-20141001CIG

Petition for Reconsideration

Dear Mr. Sanchez:

The Media Bureau (Bureau) has before it a Petition for Reconsideration (Petition) filed November 16, 2015, by Eastern New Mexico University (ENMU), licensee of translator station K258AO, Midland, Texas (K258AO or the Station). The Petition seeks reconsideration of the Bureau's decision via *Public Notice*¹ denying ENMU's request for waiver of Section 74.1231 of the Commission's rules (Signal Delivery Rule)² and dismissing the above referenced construction permit application (Application). For the reasons set forth below, we admonish ENMU for its violation of the Signal Delivery Rule, order ENMU to immediately cease delivery of a signal to the Station via satellite and deny the Petition.

Background. The Station operates on non-reserved channel 259 (99.5 MHz). From 2001 to 2006, ENMU provided public radio service via its full service station KMTH-FM to Midland, Texas through K258AO, relayed by its Andrews, Texas translator, K215BG. In 2006, a full service station, KVDG-FM, was constructed on channel 215. Its operations interfered with the reception of the K215BG signal at the K258AO transmitter site. Following several months of consultation, its engineers concluded that satellite delivery was the only viable means to continue service to Midland, Texas. From 2006 to 2014, ENMU fed KMTH-FM's signal via satellite to the K258AO in violation of the Signal Delivery Rule.³

¹ See Public Notice, Report No. 48594 "Broadcast Actions" (rel. Oct. 20, 2015) (*Public Notice*). The *Public Notice* denied ENMU's waiver request and dismissed the Application, but did not specifically order ENMU to cease unlawful satellite feed.

² 47 CFR § 74.1231(b), which limits an FM translator station operating in the non-reserved FM band to over-the-air reception of its primary station.

³ ENMU indicates that "[a]t no point during this exploration of alternatives did anyone bring Rule 74.1231 to the attention of ENMU or its engineers, so station management and engineers were unaware that satellite transmission was not permitted because the translator – although broadcasting noncommercial programming – was located on the non-reserved band." ENMU Waiver Request at 4.

In April 2013, ENMU filed to renew K258AO's license, reporting that it would now rebroadcast ENMU Station KENW-FM, but making no mention of signal delivery methods.⁴ Unaware that K258AO was being fed by satellite, the staff granted the 2013 Renewal Application on July 26, 2013.⁵

On April 4, 2014, ENMU filed a Minor Change Application for K258AO, which the staff granted on May 6, 2014.⁶ The construction permit contained a special operating condition requiring ENMU, prior to commencing operation with the facilities authorized therein, to demonstrate that K258AO could rebroadcast KMTH-FM in accordance with the Signal Delivery Rule. Now aware of its prior violation, ENMU filed the Application, which sought to correct inaccurate information supplied in the April 2014 Permit Application and included a request for waiver of the Signal Delivery Rule to continue to receive KMTH-FM by satellite, rather than over-the-air.

In its waiver request, ENMU argued that waiver is proper because K258AO meets the conditions set out in Commission Rule 1.925,⁷ and also satisfies a Commission-specific test for translator waivers which includes: (1) a demonstration that the "community is or would be 'deprived of ... service due to distance and intervening terrain obstructions,'" and (2) a showing that "waiver, if granted, is unlikely to establish a broadly-applicable precedent that would undermine the purposes of the rule and the distinction drawn by its terms."⁸ ENMU states that its proposal satisfies this test because Midland, Texas is an underserved market with "wide expanses of territory" that make other technical signal delivery options "less feasible and prohibitively expensive," and ENMU's noncommercial education (NCE) status puts it in a relatively unique situation.⁹ ENMU also contended that granting its waiver request would serve the underlying purpose of the 1988 amendment to the Signal Delivery Rule. It claims that the Station would provide a second NCE service and that the 1988 rule change restricting signal delivery was only intended to prevent commercial stations from encroaching upon each other's service areas.¹⁰ It further asserts that the requested waiver is warranted because the expansion of NCE radio has led to overcrowding in the channel 201-220 reserved band, "difficult geographic or topographic features" limit service to this remote area, and ENMU has long provided service in the Midland community.¹¹ ENMU also alludes to the staff's grant of the 2013 Renewal Application disclosing its translator arrangement as evidence of ENMU's candor and the staff's acceptance of its signal delivery arrangement.¹²

In the October 20, 2015, *Public Notice*, the staff denied ENMU's waiver request and dismissed its Application, stating that the Commission's "prior actions leave no room for waiver of the delivery rule for

⁴ BRFT-20130314AC, Section V, Item 2.b. (2013 Renewal Application).

⁵ *Broadcast Actions*, Public Notice, Report No. 48042 (rel. Jul. 31, 2013).

⁶ BPFT-20140404ABG (April 2014 Permit Application).

⁷ Rule 1.925 reads: (i) The underlying purpose of the rule(s) would not be served or would be frustrated by application to the instant case, and that a grant of the requested waiver would be in the public interest; or (ii) In view of unique or unusual factual circumstances of the instant case, application of the rule(s) would be inequitable, unduly burdensome or contrary to the public interest, or the applicant has no reasonable alternative. 47 CFR § 1.925.

⁸ ENMU Waiver Request at 21.

⁹ *Id.*

¹⁰ ENMU Waiver Request at 12; *Amendment of Part 74 of the Commission's Rules to Provide for Satellite and Terrestrial Microwave Feeds to Noncommercial Educational FM Translators*, Report and Order, 3 FCC Rcd 2196, 2198 (1988) (*NCE Translator*).

¹¹ ENMU Waiver Request at 14, 21-22.

¹² ENMU Waiver Request at 6.

the operation of other area translators in the absence of a white area showing,” citing *Peninsula Communications, Inc.*¹³ and the 1990 Amendment to the rules governing FM translators.¹⁴

In the Petition, ENMU argues the Commission’s dismissal was “perfunctory, demonstrating a complete lack of reflection, and a hasty, superficial, and automatic response to the concept of waiver itself.”¹⁵ It contends that the Commission failed to give its waiver request the required “hard look”¹⁶ and that the disposition via *Public Notice* without reasoned explanation was arbitrary and capricious in violation of the Administrative Procedure Act (APA).¹⁷ ENMU also argues that the Commission failed to note the Station’s NCE translator status.¹⁸ ENMU asserts that as an NCE translator it does not compete economically with commercial stations, and thus would not undermine the Signal Delivery Rule’s rationale.¹⁹

Discussion. Petition for Reconsideration. The Commission will consider a petition for reconsideration only if the petitioner shows either a material error in the Commission’s original order or raises new facts or changed circumstances not known or existing at the time of petitioner’s last opportunity to present such matters.²⁰ A petition for reconsideration that simply reiterates arguments previously considered and rejected will be denied.²¹ ENMU has failed to meet this burden.

With respect to the adequacy of the staff’s action on the waiver request, courts will not overturn waiver denials unless the agency’s reasons are “so insubstantial as to render that denial an abuse of discretion.”²² An agency’s “strict adherence to a general rule” may be justified – even if that application presents some hardship in individual cases.²³ The *Public Notice* disposition explains clearly that Commission pronouncements regarding the Signal Delivery Rule do not allow for waiver in the absence of a “white area” showing and cites to prior decisions supporting that conclusion.²⁴ There is no

¹³ *Peninsula Commc’ns, Inc.*, Memorandum Opinion and Order, 13 FCC Rcd 23992 (1998) (finding, in part, that waiver of the Signal Delivery Rule for four Alaska translators was not warranted upon a finding of no white spaces) (*Peninsula*).

¹⁴ *Amendment of Part 74 of the FM Commission’s Rules Concerning Translator Stations*, 5 FCC Rcd 7212 (1990) (clarifying the Commission’s position that waiver of Section 74.1231(b) “should be available only upon a showing of service to a ‘white area’”).

¹⁵ ENMU Petition for Reconsideration at 1.

¹⁶ *Id.* at 2, citing *KCST-TV v. FCC*, 699 F.2d 1185 (D.C. Cir. 1983).

¹⁷ ENMU Petition for Reconsideration at 4, citing 5 U.S.C. § 706(2)(A).

¹⁸ ENMU Petition for Reconsideration at 7-9.

¹⁹ *Id.*

²⁰ 47 CFR § 1.106(c).

²¹ *WWIZ, Inc.*, Memorandum Opinion and Order, 37 FCC 685, 686, para. 2 (1964), *aff’d sub nom. Lorain Journal Co. v. FCC*, 351 F.2d 824 (D.C. Cir. 1965), *cert. denied*, 387 U.S. 967 (1966); *Board of Trustees, Davis & Elkins College*, Memorandum and Order, 26 FCC Rcd 15555, 1556, para. 5 (MB 2011).

²² *Green Country Mobilephone, Inc. v. FCC*, 765 F.2d 235, 238 (D.C. Cir. 1985) (quoting *Thomas Radio Co. v. FCC*, 716 F.2d 921, 924 (D.C. Cir. 1983)).

²³ *BellSouth Corp. v. FCC*, 162 F.3d 1215, 1225 (D.C. Cir. 1999) (citing *Turro v. FCC*, 859 F.2d 1498, 1500 (D.C. Cir. 1988)); *see also FCC v. WNCN Listeners Guild*, 450 U.S. 582, 601 n. 44 (1981); *Thomas Radio*, 716 F.2d at 925 & n. 20.

²⁴ *See Public Notice*, *supra* note 1.

requirement that the staff's analysis be a minimum length.²⁵ Moreover, we have specifically held that public notice comments may sufficiently address the merits of a petitioner's argument.²⁶ Accordingly, we find the *Public Notice's* concise statement of the reasons for the staff action was sufficient.²⁷

Additionally, the Petition fails to show any material error in the dismissal. The Commission's rules may be waived only for good cause shown.²⁸ Petitioner is correct that the Commission must give waiver requests "a hard look," but overlooks the high hurdle such requests must overcome.²⁹ An applicant must support its waiver with a compelling showing,³⁰ and waiver is appropriate only if both: (1) special circumstances warrant a deviation from the general rule, and (2) such deviation better serves the public interest.³¹

ENMU has failed to demonstrate "special circumstances" that would warrant deviation from the Commission's general rule. By amending the FM translator rules, the Commission sought to tailor the rules to more closely reflect translator's original secondary role.³² The Commission concluded that waiver of Section 74.1231(b) should be available only upon a showing of service to a "white area," that is, an area outside the coverage contour of any full-time aural broadcast service.³³ No such area is involved here, as the staff's analysis indicates that there are at least three NCE full service stations and 10 commercial full service stations that fully encompass the area served by the Station. The Bureau has expressly refused to accept arguments that waiver of Section 74.1231(b) may be based on "either provision of a second service to a 'gray' area or the provision of an additional service to an underserved area which received fewer than five aural services."³⁴ We find that the Application's dismissal fully accords with precedent and therefore that ENMU's contention that the action was arbitrary and capricious is meritless.

²⁵ *Pamplin Broadcasting, Inc.*, Memorandum Opinion and Order, 23 FCC Rcd 649, 653, para. 10 (2008).

²⁶ See *Letter to Lawrence Bernstein, Esq.*, 24 FCC Rcd 7400, 7403 (2009) (citing *Wendell and Associates*, Memorandum Opinion and Order, 14 FCC Rcd 1671, 1679, para. 22 (1998)) ("It is clear from the staff's order that it considered [the objector's] pleadings, which is all that was required") (*Wendell*).

²⁷ See, e.g., *Wendell*, 14 FCC Rcd at 1679, para. 22 (in addressing a petition to deny, the staff need issue only a "concise statement" of the reasons for denying the petition); *CMP Houston-KC, LLC*, Memorandum Opinion and Order, 23 FCC Rcd 10656, 10660, para. 11 (2008) (Commission rejects complaint that the staff did not address the merits of appellants' arguments); *M2Z Networks, Inc. v. FCC*, 558 F.3d 554, 560 (D.C. Cir. 2009) (appeals court found that it was adequate for the Commission to name a factor -- maintaining competitive market conditions -- and give two reasons why the application would undermine that factor).

²⁸ 47 CFR § 1.3. Petitioner incorrectly cites the standard for wireless radio services, 47 C.F.R. § 1.925.

²⁹ *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969) (subsequent history omitted).

³⁰ *Greater Media Radio Co., Inc.*, Memorandum Opinion and Order, 15 FCC Rcd 7090, 7094, para. 9 (1999) (citing *Stoner Broadcasting System, Inc.*, Memorandum Opinion and Order, 49 FCC 2d 1011, 1012, para. 5 (1974)).

³¹ *NetworkIP, LLC v. FCC*, 548 F.3d 116, 125-128 (D.C. Cir. 2008); *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166, para. 5 (D.C. Cir. 1990).

³² See *Peninsula*, 13 FCC Rcd at 23993, para. 2, n.3.

³³ *Amendment of Part 74 of the FM Commission's Rules Concerning Translator Stations*, 5 FCC Rcd 7212, 7216, para. 23 (1990) (*FM Translator Stations*).

³⁴ *Letter to Kevin C. Boyle, Esq.*, 11 FCC Rcd 2348, 2350 (MMB 1996).

See *Amendment of Part 74 of the Commission's Rules Concerning FM Translator Stations*, 8 FCC Rcd 5093, 94-95, para. 9 (1993).

We also reject ENMU's claim that denial would frustrate the purposes of the Signal Delivery Rule. By allowing NCE FM translators in the reserved band to use alternative signal delivery methods, the Commission sought to serve the public interest by "facilitating improvements in the quality of signals" such translators rebroadcast and enabling them to reach larger numbers of listeners who desire NCE service -- including those in more remote geographic areas, while not altering translator's secondary status.³⁵ This limited restriction, applicable only to NCE stations in the reserved band, remains consistent with translator policy.

Violation. The Signal Delivery Rule remains applicable to all translators in the commercial band, including NCE translators and translators located in remote or topographically challenging areas. ENMU has not demonstrated special circumstances warranting deviation from the rule, and we emphatically reject the notion that ENMU's decade-long flouting of the Signal Delivery Rule provides any basis for the relief it seeks. Although we would be justified in issuing a *Notice of Apparent Liability* for this unauthorized operation,³⁶ on the facts of this case where the staff *Public Notice* denying the waiver request and dismissing the Application did not specifically order ENMU to cease the unlawful satellite feed,³⁷ we will instead admonish ENMU for its violation of the Signal Delivery Rule. We order ENMU to immediately cease the use of a satellite feed to the Station. Any further transmissions by the Station using that signal delivery methodology not permitted under the rules will subject ENMU to further enforcement action.

Conclusion/Actions. For the reasons discussed above, we find that ENMU has not shown a material error in the staff's original dismissal, nor has it raised new or previously unknown facts that otherwise warrant reconsideration. The staff's disposition of the waiver request was not arbitrary and capricious, and ENMU has failed to show that there are any special circumstances that would warrant a deviation from Section 74.1231(b) requirements.

Accordingly, IT IS ORDERED, that ENMU IS HEREBY ADMONISHED for its apparent violation of Section 74.1231(b) of the Rules. IT IS FURTHER ORDERED, that ENMU cease the delivery of a signal to K258AO via satellite.

IT IS FURTHER ORDERED that the Petition for Reconsideration filed on November 16, 2015, by Eastern New Mexico University, IS DENIED.

Sincerely,

Peter H. Doyle
Chief, Audio Division
Media Bureau

³⁵ *NCE Translator*, 3 FCC Rcd at 2196, para 1.

³⁶ See, e.g., *Peninsula Communications, Inc.*, Notice of Apparent Liability and Order, 16 FCC Rcd 16124 (2001) (licensee that continued translator operations subsequent to Commission order to terminate such operations issued a \$140,000 Notice of Apparent Liability); *Application of E-String Wireless, Ltd.*, Memorandum Order and Opinion and Notice of Apparent Liability for Forfeiture, 31 FCC Rcd 133, 139, para. 17 (MB 2016) (assessing a \$4,000 forfeiture for an FM translator station operating in violation of Section 73.1745(a)).

³⁷ See n.1, *supra*.