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June 25, 2020

La Promesa Foundation
1406 E. Garden Lane
Midland, TX 79701

In re: W224CK, Vestavia Hills, AL
Facility ID No. 156965
BMPFT-20190910AEW
Petition for Reconsideration

Dear Applicant:

This letter is in reference to: (1) the above captioned application filed by La Promesa Foundation (LPF), dismissed on October 21, 2019; (2) the Petition for Reconsideration (Petition) filed on November 1, 2019, requesting reconsideration of the dismissal; and (3) all related pleadings. For the reasons set forth herein, we deny the Petition.

Background

LPF filed its application on September 10, 2019 seeking authorization to operate on channel 214. LPF is currently authorized to operate on channel 224 (BLFT-20160929AII), Vestavia Hills, Alabama. The proposed application on channel 214, or 10th adjacent, is a major change application which is a violation of 47 C.F.R. § 74.1233(a)(1). This major change was not addressed in the application nor was a waiver of 47 C.F.R. § 74.1233(a)(1) requested. On October 21, 2019, staff dismissed the application for violating 47 C.F.R. § 74.1233(a)(1). On November 1, 2019, LPF filed its Petition requesting that the application be reinstated and granted.

Petition for Reconsideration

In its Petition, and Supplement filed on February 11, 2020, LPF seeks a waiver of 47 C.F.R. § 74.1233(a)(1) claiming that operation on channel 214 is the only viable interference free channel and that operation on channel 214 will provide interference free service to 557,006 persons in the Birmingham, Alabama metropolitan area. In support of its waiver request, LPF claims that its currently licensed facility receives substantial interference from co-channel stations, WTDR-FM, Talladega, Alabama, and W224CN, Leeds, Alabama, and that this qualifies the facility to move to channel 214 under the revised interference rules. In addition, LPF claims that the use of channel 214 will constitute a more efficient use of spectrum and will be in the public interest. LPF further states that since the translator is currently rebroadcasting a non-commercial primary station, the move from the non-reserved band to the reserved band will not subvert future auction of spectrum in the non-reserved band in the Birmingham, Alabama area.

Discussion

When LPF filed its application, staff correctly dismissed it for being patently defective. LPF has failed to show any error in the dismissal of the application in accordance with 47 C.F.R. § 73.3566(a) of the Rules.¹ To the extent LPF seeks a waiver of 47 C.F.R. § 74.1233(a)(1), the Rules may be waived for only good cause shown.² The Commission must give waiver requests “a hard look,” but an applicant for waiver “faces a high hurdle even at the starting gate”³ and must support its waiver request with a compelling showing.⁴ 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.⁵ When it revised its translator interference rules, the Commission reasoned that “restricting channel changes to the same band is necessary to preserve the integrity of the different processing systems we use for each band and to prevent licensees from avoiding competitive bidding by band hopping. Moreover, our use of filing windows is critical to provide equal opportunity to frequencies for translator applicants across the country.”⁶ Therefore, the Commission revised 47 C.F.R. § 74.1233(a)(1) to state “a major change is any change in frequency (output channel) except: (1) changes to first, second or third adjacent channels, or intermediate frequency channels; or (2) upon a showing of interference to or from any other broadcast station, remedial changes to any same-band frequency.” Granting this waiver could foreclose filing opportunities of other potential applicants and licensees that desire to file new stations and modification applications in the reserved band. Therefore, a waiver in the instant circumstances would be contrary to the public interest. In addition, a request for waiver of the Commission’s rules must “set forth the reasons in support thereof including a showing that unique and compelling circumstances are involved and that there are no reasonable alternatives with existing rules.” The record before us does not present unique circumstances sufficient to justify grant of the waiver request. Specifically, the benefits of LPF increasing its service area does not constitute a distinguishing circumstance warranting grant of the waiver and the Petition for Reconsideration. Numerous stations may wish to apply for a channel in another band to avoid interference in their existing band; in fact, this possibility was expressly considered and rejected in the *Report and Order*. The public interest benefits as a whole are best served when the Commission’s rules are applied in a fair and consistent manner. Granting LPF’s Petition for Reconsideration would be fundamentally unfair to all parties potentially interested in participating in the translator window filing process in the reserved band. Accordingly, the waiver request and Petition for Reconsideration will be denied.

For the reasons set forth above, La Promesa Foundation’s Petition for Reconsideration IS HEREBY DENIED. This action is taken pursuant to 47 C.F.R. Section 0.283.

Sincerely,

/s/

James D. Bradshaw
Senior Deputy Chief
Audio Division
Media Bureau

cc: Dennis J. Kelly

¹ 47 CFR § 73.3566(a).

² 47 CFR § 1.3

³ *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969) (*WAIT Radio*) (subsequent history omitted).

⁴ *Greater Media Radio Co., Inc.*, Memorandum Opinion and Order, 15 FCC Red 7090 (1999) (citing *Stoner Broad. Sys., Inc.*, Memorandum Opinion and Order, 49 FCC 2d 1011, 1012 (1974)).

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

⁶ *Amendment of Part 74 of the Commission’s Rules Regarding FM Translator Interference*, Report and Order, 34 FCC Rcd 3457 (2019) (Report and Order).

