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DA 13-860

In Reply Refer to:

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Sam-Sno Educational Media
c/o Ms. Jennifer Diane Reitz
470 Mt. Defiance Circle, SW
Issaquah, WA 98027

**In re: NEW FM TRANSLATOR STATION,
McCleary, WA**
Facility ID No. 144097
File No. BNPFT-20030312BEX

**NEW FM TRANSLATOR STATION,
North Olympia, WA**
Facility ID No. 149094
File No. BNPFT-20030314CJX

Request for Waiver

Dear Ms. Reitz:

This letter concerns: (1) the March 12 and 14, 2003, applications ("McCleary Application" and "North Olympia Application," respectively) filed by Sam-Sno Educational Media ("Sam-Sno") for construction permits for new FM Translator Stations at McCleary and North Olympia, Washington; and (2) Sam-Sno's January 10, 2013, request for waiver ("Waiver Request") of the provisions in the Commission's *Fifth Order on Reconsideration*¹ prohibiting contour overlap between two FM translator applications filed by the same licensee in the same market. For the reasons set forth below, we deny the Waiver Request, dismiss the McCleary Application, and continue processing the North Olympia Application.

Background. The McCleary and North Olympia Applications were filed in the March 2003 FM non-reserved band translator (Auction 83) filing window.² Both are in the "Appendix A" market of Seattle, Washington, as specified in the *Fourth Report and Order*³ in which the Commission adopted market-specific FM translator application processing policies designed to effectuate the Local

¹ *Creation of a Low Power Radio Service and Amendment of Service and Eligibility Rules for FM Broadcast Translator Stations*, Fifth Order on Reconsideration and Sixth Report and Order, 27 FCC Rcd 15402 (2012) ("*Fifth Order on Reconsideration*").

² See *FM Translator Auction Filing Window and Application Freeze*, Public Notice, 18 FCC Rcd 1565 (MB/WTB 2003). The filing window was subsequently extended to March 17, 2003. *FM Translator Auction Filing Window and Application Freeze Extended to March 17, 2003*, Public Notice, 18 FCC Rcd 3275 (MB/WTB 2003).

³ *Creation of a Low Power Radio Service and Amendment of Service and Eligibility Rules for FM Broadcast Translator Stations*, Fourth Report and Order and Third Order on Reconsideration, 27 FCC Rcd 3364 (2012) ("*Fourth Report and Order*").

Community Radio Act.⁴ In the *Fifth Order on Reconsideration*, the Commission decided that it would allow applicants to prosecute a maximum of three applications in an “Appendix A” market, provided that: (1) the protected (60 dB μ) contour (calculated in accordance with Section 74.1204(b) of the Commission’s Rules (the “Rules”)⁵ of a proposed translator station may not overlap the protected (60 dB μ) contour of any other translator application filed by that applicant in Auction 83 or any translator authorization held by that applicant as of December 4, 2012; and (2) the translator application may not preclude grant of a future low power FM (“LPFM”) application in the “grid” for that market.⁶ On January 10, 2013, in response to a Media Bureau Public Notice⁷ that, *inter alia*, required applicants subject to the per-market cap to submit certain showings during the window opened for these filings, Sam-Sno requested the dismissal of five of its applications⁸ and that the McCleary and North Olympia Applications be processed pursuant to a waiver of the overlap provision.

In its Waiver Request, Sam-Sno contends that the overlap between the McCleary and North Olympia Applications is *de minimis*.⁹ Specifically, Sam-Sno argues that its two proposed FM translator stations are intended to serve different geographical areas and the overlap encompasses only 1.4 square kilometers, containing a population of approximately 761 persons.¹⁰ Sam-Sno claims that, although no *de minimis* overlap threshold is stated in the *Fifth Order on Reconsideration*, the Commission “has set a precedent in other broadcast decisions that indicates that some leeway could be granted in this case for the public good and necessity.”¹¹ Finally, Sam-Sno requests that the North Olympia Application be processed and that the McCleary Application be dismissed if we determine that it is impossible to allow both “Appendix A” applications to be processed.¹²

Discussion. Section 1.3 of the Rules expressly provides that any provision of the Rules may be waived by the Commission in whole or in part, for good cause shown.¹³ An applicant seeking a waiver

⁴ Pub. L. No. 111-371, 124 Stat. 4072 (2011).

⁵ See *Fifth Order on Reconsideration*, 27 FCC Rcd at 15410 and at 15421; see also 47 C.F.R. § 74.1204(b).

⁶ See *Fifth Order on Reconsideration*, 27 FCC Rcd at 15410 and at 15421.

⁷ See *Media Bureau Announces January 10 - January 25, 2013 Filing Window for Auction 83 FM Translator Application Selections and Caps Showings*, Public Notice, 27 FCC Rcd 15961 (MB 2012).

⁸ Sam-Sno requested the dismissal of the following applications: File Nos. BNPFT-20030317ACC, Newcastle; BNPFT-20030317ABW, Vashon; BNPFT-20030317AAS, Manzanita; BNPFT-20030317ACA, Hunt’s Point; and BNPFT-20030312BFM, Bordeaux, all in Washington state. The staff dismissed these applications on February 5, 2013. See *Media Bureau Dismisses FM Translator Form 349 “Tech Box” Proposals and Releases Applicant Selection Lists and Caps Showings Filings*, Public Notice, DA 13-152 (rel. Feb. 5, 2013).

⁹ Waiver Request at 1.

¹⁰ For the North Olympia Application, Sam-Sno claims that the 1.4 square kilometers overlap is 0.2% of its 561.2 square kilometers 60 dB μ contour, and its overlap population of 761 is 0.5% of its full contour population of 156,684. For the McCleary Application, Sam-Sno claims that the overlap constitutes 0.3% of its 495.8 square kilometers 60 dB μ contour, and the overlap population is 9% of its full contour population of 8,207. *Id.*

¹¹ *Id.* Sam-Sno cites no cases supporting this assertion.

¹² *Id.* Sam-Sno also asserts that no new LPFM stations would be precluded by the grant of either the McCleary or North Olympia Applications. In light of our actions here, we need not reach this argument.

¹³ 47 C.F.R. § 1.3.

has the burden to plead with particularity the facts and circumstances that warrant such action.¹⁴ The Commission must give waiver requests “a hard look,” but an applicant for waiver “faces a high hurdle even at the starting gate”¹⁵ and must support its waiver request with a compelling showing.¹⁶ The Commission may exercise its discretion to waive a policy or rule where the particular facts make strict compliance inconsistent with the public interest.¹⁷ In addition, the Commission may take into account considerations of hardship, equity, or more effective implementation of overall policy on an individual basis.¹⁸ However, waiver of the Commission's policies or rules is appropriate only if both (i) special circumstances warrant a deviation from the general rule, and (ii) such deviation will serve the public interest.¹⁹

The facts presented by Sam-Sno do not meet this burden. The Commission instituted the strict contour overlap prohibition due to its concern over service duplication especially when, as in this case, a party files multiple applications proposing to provide service to the same market.²⁰ The Commission stated that it believed that this filing strategy provided opportunities to game the auction system or to obtain permits for the purpose of selling them.²¹ It also found that a significant number of translator stations authorized out of Auction 83 were either assigned to another party or never constructed, and that this conduct raised concerns about whether the applications had been filed with a good faith intent to construct and operate the proposed stations.²² The Commission therefore sought to “limit substantially the opportunity to warehouse and traffic in translator authorizations while promoting diversity goals”²³ and to “[balance] the competing interests of adding new service to underserved areas by translators versus preserving the integrity of our licensing process by dismissing applications filed for speculative reasons or to skew our auction procedures.”²⁴ Accordingly, when the Commission instituted the relaxed limit of three applications per market, it clearly stated that the higher cap would only apply if applications meet the “no overlap” and grid-protection requirements.

¹⁴ See *Columbia Communications Corp. v. FCC*, 832 F.2d 189, 192 (D.C. Cir. 1987).

¹⁵ See *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969), *aff'd.*, 459 F.2d 1203 (1972), *cert. denied*, 93 S.Ct. 461 (1972) (“*WAIT Radio*”). See also *Thomas Radio v. FCC*, 716 F.2d 921, 924 (D.C. Cir. 1983).

¹⁶ *Greater Media Radio Co., Inc.*, Memorandum Opinion and Order, 15 FCC Rcd 7090 (1999) (citing *Stoner Broadcasting System, Inc.*, Memorandum Opinion and Order, 49 FCC 2d 1011, 1012 (1974)).

¹⁷ *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (“*Northeast Cellular*”).

¹⁸ *WAIT Radio*, 418 F.2d at 1159; *Northeast Cellular*, 897 F.2d at 1166.

¹⁹ *NetworkIP, LLC v. FCC*, 548 F.3d 116, 125-128 (D.C. Cir. 2008) (“*NetworkIP*”); *Northeast Cellular*, 897 F.2d at 1166.

²⁰ See *Fifth Order on Reconsideration*, 27 FCC Rcd at 15421. The Commission specifically noted that certain factors, particularly the limited service area of a translator compared to the size of the “Appendix A” market, weighed in favor of allowing more than one translator application in an “Appendix A” market, provided that each translator would serve a different part of the market than any of an applicant’s existing translators or other pending translator applications. *Id.* at 15420.

²¹ *Id.* at 15421.

²² *Id.* at 15420

²³ *Id.* at 15406, citing *Creation of a Low Power Radio Service and Amendment of Service and Eligibility Rules for FM Broadcast Translator Stations*, Third Further Notice of Proposed Rulemaking, 26 FCC Rcd 9986, 9999 ¶ 34 (2011).

²⁴ *Fifth Order on Reconsideration*, 27 FCC Rcd at 15420.

Notwithstanding Sam-Sno's arguments that the McCleary and North Olympia Applications propose to serve different "areas" within the Seattle market and have "*de minimis*" overlap, there are no "special circumstances" here that would warrant a deviation from the general rule. As an initial matter, the Commission did not establish a "*de minimis*" processing standard. Moreover, we cannot find that deviation from the contour overlap prohibition here would serve the public interest. Based on its concerns about the conduct exhibited previously by a number of Auction 83 participants, the Commission concluded that a strict "no overlap" policy was necessary to preserve the integrity of the licensing process and to efficiently process the remaining applications.²⁵ Those considerations apply here. Accordingly, we cannot find that waiver would serve the public interest.

Conclusion/Actions. Accordingly, for the reasons set forth above, IT IS ORDERED, that the January 10, 2013, Waiver Request of Sam-Sno Educational Media IS DENIED.

IT IS FURTHER ORDERED, that the application (File No. BNPFT-20030312BEX) of Sam-Sno Educational Media for construction permit for a new FM translator station at McCleary, Washington, IS DISMISSED. The staff will continue processing the application (File No. BNPFT-20030314CJX) of Sam-Sno Educational Media for construction permit for a new FM translator station at North Olympia, Washington.

Sincerely,

Peter H. Doyle
Chief, Audio Division
Media Bureau

²⁵ See *Fifth Order on Reconsideration*, 27 FCC Rcd at 15421. As the Commission has explained, attempting a case-by-case analysis of the thousands of pending translator applications for compliance with that rule is not feasible. *Id.* The Commission also stated that its per-market cap restrictions also would advance the goal of the "Technical Need Rule" to limit the licensing of multiple translators serving the same area to a single licensee. See also 47 C.F.R. § 74.1232(b); *Fourth Report and Order*, 27 FCC Rcd at 3392 ("Our translator rules contemplate that a party may receive an authorization for a second or third FM translator serving substantially the same area as the first only after making a 'showing of technical need for such additional stations.'").