

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

FORUS FM
BROADCASTING OF
NEW YORK, INC.

File No. BPFTB-890824TB

For Construction Permit for a New
FM Booster Station (WVOA-FM1) on
Channel 286 in Syracuse, New York

MEMORANDUM OPINION AND ORDER

Adopted: November 9, 1992; Released: December 2, 1992

By the Chief, Audio Services Division:

1. Now before the Division is a petition for reconsideration of the grant of the above-captioned application of Forus FM Broadcasting of New York, Inc. ("Forus"), licensee of FM Station WVOA, DeRuyter, New York. The petition was filed by WKFM-Syracuse, Inc. ("WKFM"), licensee of FM Station WKFM, Fulton, New York. Also before the Commission are related pleadings and other submissions filed by Forus and WKFM in this proceeding.

PROCEDURAL MATTERS

2. Forus filed an application to construct a new FM booster station on August 24, 1989.¹ The uncontested application was granted on November 22, 1989. WKFM sought reconsideration of the grant on December 29, 1989. It contends that the authorization should be rescinded because the proposed facility would cause interference to the off-the-air reception of WKFM in Syracuse, in violation of 47 C.F.R. § 74.1203.²

3. Standing to file a petition for reconsideration is conferred by § 405 of the Communications Act of 1934, as amended, 47 U.S.C. § 405, and by 47 C.F.R. § 1.106(b). In accordance with these provisions, a petition for reconsideration may be filed only by a party to the proceeding or, in the alternative, any person aggrieved or whose interests are adversely affected by the action taken and who, in addition, shows good reason why it was not possible to participate in the earlier stages of the proceeding. *Montgomery County Broadcasting Corporation*, 65 FCC 2d 876 (1977); *KRPL, Inc.*, 5 FCC Rcd 2823 (1990).

¹ The purpose of the booster station was to permit Forus to simultaneously retransmit the WVOA signal to areas and populations in Syracuse that are unable to receive satisfactory service from WVOA due to terrain variations.

² On June 1, 1991, § 74.1203 was revised by the *Report and Order* in MM Docket No. 88-140, 5 FCC Rcd 7212 (1990) ("*Translator Report and Order*"); modified, 6 FCC Rcd 2334 (1991). Subsection (a) of the revised section provides, in per-

4. At no time prior to the grant of the construction permit application did WKFM interpose an objection. Consequently, WKFM's petition seeks reconsideration of action taken in a proceeding to which it was not a party. In order to demonstrate standing to file its petition, WKFM states that its interests would be adversely affected by the grant because of the interference that would be caused to the reception of its facilities by Forus' booster station. Moreover, WKFM submits that it had not participated earlier because the September 20, 1989 Public Notice announcing the application as tendered for filing (Report No. 14559), listed only the proposed transmitter output power of 2.5 kW, as opposed to the proposed effective radiated power ("ERP") of 8 kW. WKFM maintains that if it had been informed that the proposed booster station would operate with facilities greater than a Class A FM station, it would have timely filed a petition to deny the application.

5. We find that WKFM has failed to establish good cause for not participating earlier in the proceeding. Hence, it lacks the requisite standing to file a petition for reconsideration of the grant of the Forus application. All Commission public notices announcing the tender of FM booster stations specify the proposed transmitter output power and not the ERP. From this notice, interested parties are charged with constructive notice of the subject application. This, coupled with the fact that the public notice specified Syracuse as the proposed community of license for the booster station, meant that WKFM, by the exercise of reasonable diligence, could have determined the facts relating to the proposed station's power and the effect it would have on the operation of WKFM. *See High Country Communications*, 4 FCC Rcd 6237, n.2. (1989); *See also Rivoli Realty Co.*, 27 FCC 2d 1004 (1971).

6. Accordingly, the WKFM petition will be dismissed. However, because of the events following grant of the booster, we will consider on our own motion the policy questions presented and the appropriate action to take in such a situation.

BACKGROUND

7. While the petition for reconsideration was pending, Forus commenced equipment test operation of the booster station on March 15, 1990.³ On March 16, 1990, WKFM requested that the booster be ordered to cease operation, pursuant to § 74.1203, because its operation was causing "destructive" interference to the reception of WKFM's signal within its 1 mV/m service area. Consequently, Forus was directed to terminate operations. Believing that the interference was a one time occurrence, Forus resumed operations on March 23, 1990. WKFM, by letter of that same date, again complained that the booster's operation was causing "destructive" interference to the reception of

... tintent part, that an authorized FM booster station "will not be permitted to continue to operate if it causes any actual interference to: ... the transmission of any authorized broadcast station; or ... the direct reception by the public of the off-the-air signals of any authorized broadcast station...." 47 C.F.R. § 74.1203(a) (1991).

³ Equipment tests are authorized by 47 C.F.R. § 74.13, and may be continued as long as the construction permit shall

WKFM.⁴ The Chief of the Auxiliary Services Branch directed Forus to discontinue operation of the booster station pending resolution of this matter.

8. The parties subsequently agreed to conduct joint listening tests to determine the effect of the booster station's operation on WKFM's reception in Syracuse. The listening tests, which were conducted on April 10, 1990, covered eight mutually agreed upon points in the Syracuse area. At the conclusion of the testing, the amount and the type of interference remained in dispute. However, both parties agreed that interference had resulted from operation of the booster station. Forus concluded that based on the location of the interference (the two test points closest to the transmitting site), it should have an opportunity to rectify any complaints and it expressed a willingness to resolve complaints by providing new receivers or by repositioning and/or reorienting the antennas of affected receivers. WKFM contended that its signal would receive actual off-the-air interference as a result of the booster's operation at six of the eight test sites and that it detected intermediate frequency ("IF") interference at two of the sites.

9. To further facilitate resolution of this case, the parties and their representatives met with Commission staff on December 13, 1990. As a result of this meeting, it was agreed that Forus would be permitted to commence operation pursuant to special temporary authority ("STA") in order to determine if listener complaints would result from the booster's operation and, if so, to determine Forus' ability to resolve such complaints. The STA was issued on February 20, 1991, and ran through April 25, 1991. Thereafter, both parties were to submit reports and reply comments on the results of the STA operation. On April 22, 1991, Forus requested an indefinite extension of the STA. WKFM objected to the extension noting that the temporary operation resulted in unresolved listener complaints. More specifically, WKFM argued that interference had been received by mobile receivers and that, since such listeners constituted a significant portion of its radio station's listening audience, this interference could not be ignored. Forus reiterated its intent to resolve all outstanding complaints. We denied Forus' request for an extension of its operating authority on April 25, 1991, so that we could have an opportunity to analyze the STA results without the potential for further complaints.

CONTENTIONS OF THE PARTIES

10. Both Forus and WKFM filed reports and reply comments on the results of the STA operation. WKFM reported that it had forwarded 48 listener complaints involving 51 radio receivers to Forus for resolution. Of the 48 complaints received, 19 required resolution and 29 required no further action because the complaints were either not booster related or assistance was declined. Six of the 19 complaints requiring resolution remain unresolved. These six complaints all involve mobile receivers.

11. Forus attributes the remaining unresolved complaints of interference to Front End Receiver Overload ("FERO"). It suggests that the obligations to satisfy all interference complaints imposed upon permittees for FM booster sta-

tions by § 74.1203 should be viewed the same as the obligations set out for full service FM permittees to satisfy all interference complaints within their blanketing contour. In this regard, Forus notes that under 47 C.F.R. § 73.318(b), mobile receivers, because of their "inherent transient nature," are excluded from a full service FM permittee's obligation for corrective efforts. *Report and Order* in BC Docket No. 82-186, 57 RR 2d 125, 130 (1984). Forus notes further that the Commission extended this mobile receiver exclusion to interference caused by Receiver Induced Third Order Intermodulation Effect ("RITOIE"). See *WKLX, Inc.*, 6 FCC Rcd 225, 227 (1991). Claiming that interference caused by FERO is no greater than blanketing or RITOIE, Forus argues that the principle should be extended in this instance, thereby alleviating it of having to resolve the remaining complaints of interference.

12. Alternatively, Forus views 19 cognizable complaints, out of WKFM's potential of 5,300 listeners per quarter hour, as insufficient to be considered "significant" for determining whether the booster causes "harmful interference" to WKFM's reception. *Report and Order* in MM Docket No. 87-13, 2 FCC Rcd 4625, 4629 (1987) ("*Booster Report and Order*"); *amended*, 6 FCC Rcd 6060 (1991). Forus again reiterates its willingness to continue to resolve all reports of cognizable interference complaints that are brought to its attention and to replace any affected mobile receivers. Finally, Forus believes that operation of the booster station with vertical polarization only would alleviate a great portion of the interference presently caused.

13. In response, WKFM contends that Forus has failed to resolve a significant number of complaints and, pursuant to § 74.1203, such failure should result in rescission of the construction permit. Further, WKFM argues that Forus' reliance on FERO or the Commission's blanketing rules (§ 73.318) is misplaced and should not excuse Forus' failure to resolve the remaining interference complaints. WKFM asserts that those rules apply only to full service FM stations authorized under Part 73 of the Commission's Rules (47 C.F.R. § 73), and not to secondary stations authorized under Part 74 of the rules (47 C.F.R. § 74). Additionally, WKFM insists that if Forus is willing to resolve interference complaints, it should be required to resolve those experienced by mobile receivers. Moreover, it contends that in all probability interference was greater than reported in that some listeners who received interference most likely changed stations instead of taking the effort to file complaints.

DISCUSSION

14. Section 74.1203 establishes the standards for dealing with interference to second and third adjacent channel stations which results from operation of an FM booster station.⁵ *Booster Report and Order, supra* at 4629. The rule was revised by the Commission in the *Translator Report and Order, supra* n.2., and the revised subsection (a) of the rule currently reads as follows:

remain valid.

⁴ In addition to the equipment test provisions of § 74.13, short test transmissions are permitted by § 74.1203(b) during the period of suspended operation to check the efficacy of remedial

measures taken by the booster operator.

⁵ Prior to the *Booster Report and Order*, the provisions of § 74.1203 set out only the interference protection standard for FM translators.

An authorized FM ... booster station will not be permitted to continue to operate if it causes any actual interference to ... the direct reception by the public of the off-the-air signals of any authorized broadcast station.... Interference will be considered to occur whenever reception of a regularly used signal is impaired by the signals radiated by the FM ... booster station, regardless of the quality of such reception, the strength of the signal so used, or the channel on which the protected signal is transmitted.

47 C.F.R. § 74.1203(a) (1991). (emphasis added). If the interference cannot be promptly eliminated by the application of suitable techniques, § 74.1203(b) provides further that "operation of the offending FM ... booster station shall be suspended and shall not be resumed until the interference has been eliminated."

15. Thus, the provisions of § 74.1203 proscribe booster stations from causing any actual interference to the off-the-air signal of any authorized broadcast station. In that regard, actual interference occurs when broadcast operation of the FM booster station results in the receipt of listener complaints alleging the impairment of a regularly received signal. Because of the secondary nature of the FM booster service, we view this proscription to be inclusive of all types of interference, including interference resulting from FERRO and IF interference.⁹

16. Six interference complaints to mobile receivers remain unresolved in this matter. We recognize that, due to their "inherent transient nature," mobile receivers have been explicitly excluded from the correction responsibility of full service FM permittees and licensees where the interference results from blanketing and RITIOE. *Report and Order* in BC Docket No. 82-186. *supra*; *WKLX, Inc., supra*. However, because of the secondary nature of FM boosters, and the resulting requirement that they provide interference-free service, extension of the exemption for mobile receivers applied to full service FM stations would not be appropriate to interference resulting from an FM booster station's operation. The FM booster rules do not recognize the acceptability of any interference.⁸

17. Forus argues that it should be allowed to continue operation because the number of unresolved complaints does not reach the "significant number of complaints" standard established in the *Booster Report and Order, supra* at 4629.⁶ Even if that standard still applies to booster

stations, Forus misconstrues how the standard is to be applied. Although the "significant number of complaints" standard was not written into the rule itself, the *Booster Report and Order* stated that the existing translator interference standard, which provides that operation is permissible only where no harmful interference is caused, would be applied to boosters. It went on to state that for the purposes of this rule, harmful interference would be deemed to occur when a significant number of complaints was received. *Id.* at 4629. However, the rule itself states that once interference is deemed to occur and the translator or booster is required to cease operating, operation may not resume until the interference has been eliminated. Thus, the "significant number of complaints" standard is an initial threshold to determine when booster service must be terminated, but does not establish a standard for when service may resume. Service may be resumed only when interference has been eliminated.

18. Here, we have evidence of a recurring pattern of interference complaints, some of which have not been corrected. Based on this pattern of complaints, we have determined that there is sufficient justification to deny authority for the booster station to resume operations. This determination is not based on any specific number, but represents our assessment of the overall situation and reflects our determination that booster stations are secondary services which may not cause interference to the reception of any off-the-air broadcast station signal.

CONCLUSION

19. Based on the above, we conclude that Forus has caused interference to the reception of the broadcast station signal of WKFM and that this interference, which includes interference to mobile receivers, is inconsistent with the proscriptions of § 74.1203 of the Commission's rules. In view of the above, we conclude that Forus has failed to meet its responsibilities for continued operation of the booster station. Consequently, authority for Forus' booster station to resume operations cannot be authorized. In view of the fact that the construction permit for the booster station expired on May 22, 1991, and no application has been filed to extend the construction period or reinstate the permit (FCC Form 307), the construction permit has expired on its own terms and will, therefore, be cancelled.¹⁰

⁶ Thus, it is not necessary to determine whether the outstanding interference complaints result from FERRO, as claimed by Forus, or from IF interference, as claimed by WKFM.

⁷ In the *Booster Report and Order*, we repeatedly emphasized that FM boosters are merely fill-in facilities, secondary to full service stations, and where interference results from their operation it is the responsibility of the FM booster licensee to resolve the problem.

⁸ The only exception being the limited interference caused to the signals of the primary stations being rebroadcast. See § 74.1203(c).

⁹ In the context of the FM translator rule making proceeding, the Commission proposed revising § 74.1203 by using the "significant number of complaints" standard for determining when interference is caused to the direct reception by the public of the off-the-air signal of an authorized broadcast station. *Notice of Proposed Rule Making* in MM Docket No. 88-140, 5 FCC Rcd 2106, 2126 (1990). However, after considering the effectiveness of this standard, the Commission decided that inclusion of the

significant number of complaints language in the revised rule would be inappropriate, and stated that "when convinced that a complaint or complaints of uncorrected interference are valid ... [it] will direct ... [the] station to discontinue operation." *Translator Report and Order, supra* at 7230. The Commission stated further that the judgment necessary to determine the validity of the uncorrected interference complaint or complaints would be dependent upon the individual circumstances presented in each case. Therefore, a question can be raised as to whether the "significant number of complaints" standard still applies to FM Boosters. We do not find it necessary to answer that question here.

¹⁰ Consistent with the provisions of § 312 of the Communications Act of 1934, as amended, 47 U.S.C. § 312, we would ordinarily issue an order to show cause, where the permit has not expired, as to why the permit should not be revoked. Here, however, the construction permit has expired on its own terms justifying its cancellation. Even if Forus were to submit an application for replacement of the expired construction permit

20. Accordingly, IT IS ORDERED that the petition for reconsideration filed by WKFM-Syracuse, Inc. IS DISMISSED. IT IS FURTHER ORDERED that the construction permit granted to Forus FM Broadcasting of New York, Inc. (File No. BPFTB-890824TB) for a new FM booster station to serve Syracuse, New York IS CANCELLED and the call sign WVOA-FM1 IS DELETED.

FEDERAL COMMUNICATIONS COMMISSION

Larry D. Eads, Chief
Audio Services Division
Mass Media Bureau

and an accompanying license application, on reconsideration, we would be unable to look favorably on the grant of such

applications given Forus' inability to comply with the provisions of § 74.1203.