

Construction Permit Issuance of  
Translator FM

Section 74.1232(d)(1) of the Rules does not proscribe the authorization of a commercial FM translator to the licensee of the primary station proposing to provide service outside that station's 1 mV/m contour and within the 1 mV/m contour of an unbuilt, non-operational commercial FM broadcast station assigned to a different principal community.

—*Ber-Tec B/cing, Inc.*

FCC 85-361

**BEFORE THE**  
**FEDERAL COMMUNICATIONS COMMISSION**  
WASHINGTON, D.C. 20554

In re Application of  
BER-TEC Broadcasting, Inc.  
Gold Beach, Oregon  
KURY Radio, Inc.  
Gold Beach, Oregon  
For Construction Permits for New FM Trans-  
lator Stations

File Nos.  
BPFT-800909IQ  
BPFT-800421IC

MEMORANDUM OPINION AND ORDER

Adopted: July 9, 1985; Released: July 16, 1985

BY THE COMMISSION: COMMISSIONER RIVERA NOT PARTICIPATING.

1. The Commission has before it for consideration: (a) the above-captioned applications; (b) two Petitions to Deny by James N. Hoff, filed November 25, 1980; (c) staff letters, dated January 19, and February 24, 1984, denying the petitions to deny and granting these applications; (d) Petitions for Reconsideration by Chambers Broadcasting (Chambers), filed February 21, and March 23, 1984; (e) two staff letters dated June 6, 1984, denying the petitions for reconsideration; (f) two Applications for Review by Chambers, filed July 16, 1984; (g) an Opposition to Application for Review by BER-TEC Broadcasting, Inc., (BER-TEC) filed July 23, 1984; and (h) related pleadings and correspondence.

2. KURY Radio, Inc. (KURY Radio) and BER-TEC each filed an application for a new station-owned commercial FM translator to serve Gold Beach, Oregon, by rebroadcasting, respectively, the signals of their FM Broadcast Stations, KURY(FM), Brookings, Oregon, and KCRE-FM, Crescent City, California. On November 25, 1980, James N. Hoff (Hoff), who at that time had pending an application for a new first local commercial FM broadcast station at Gold Beach, Oregon (File No. BPH-800723AH), filed against each translator application a petition to deny alleging that its proposal violated Section 74.1232(d)(1) of the Commission Rules.<sup>1</sup> Hoff's FM broadcast station application was granted on January 27, 1981, and assigned the call sign KGBR(FM). Station KGBR(FM) still was not operational on January 19, and February 24, 1984, the dates of the staff's actions disposing of Hoff's petitions to deny these translator applications.<sup>2</sup> The staff concluded that the proscription in Section 74.1232(d)(1) of the Rules does not apply where the proposed station-owned FM translator is intended to provide reception within the predicted 1 mV/m contour of an unbuilt, non-operational commercial FM broadcast station. Thus, upon a finding that although Gold Beach, Oregon is outside the respective 1 mV/m contours of Stations KURY(FM) and KCRE-FM, it is not within the 1 mV/m contour of any operational commercial FM broadcast station, Hoff's petitions to deny were denied and the captioned translator applications were granted.

3. The construction permit for Station KGBR(FM) was assigned from Hoff to Chambers on February 8, 1983. Chambers petitioned for reconsideration of the staff's actions, alleging that although Station KGBR(FM) was not operational, the grant of these translator applications nevertheless contravened Section 74.1232(d)(1) of the Rules.<sup>3</sup> Reconsideration was denied on the ground that Chambers neither presented any new substantial or persuasive arguments which were not previously considered, nor

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<sup>1</sup> Section 74.1232(d) provides that "An authorization for a commercial FM translator which is intended to provide reception to places which are beyond the predicted 1 mV/m field strength contour of the primary station and within the predicted 1 mV/m field strength contour of another commercial *FM radio broadcast station* assigned to a different principal community will not be granted to: (1) The licensee or permittee of an FM broadcast station. . . ." [Emphasis added.]

<sup>2</sup> Station KGBR(FM) is still not operational. A sixth request for extension of time to construct the station was filed May 15, 1985 (BMPH-850515IA).

<sup>3</sup> Since Station KGBR(FM) would compete for audience in Gold Beach, Oregon with these translator stations, and could suffer economic injury to the extent that audience is diverted, Chambers, as Hoff's successor-in-interest, had standing to petition for reconsideration of the staff's actions granting these applications, and has standing to file these applications for review. See *Federal Communications Commission v. Sanders Brothers Radio Station*, 309 U.S. 470 (1940); Sections 1.106 and 1.115 of the Commission's Rules.

demonstrated any errors in the analysis of the facts or the authority supporting the staff's actions. See Section 1.106(a)(1) of the Rules.

4. In its application for review, Chambers requests consideration of whether the protection afforded licensees of commercial FM broadcast stations in Section 74.1232(d)(1) of our Rules extends to permittees of commercial FM stations which are authorized but not operational prior to the authorization of a station-owned FM translator. Chambers asserts that due to the size of the Gold Beach market, the intrusion of even one of these translators, which Chambers claims do not place 1 mV/m signals over the entire community, makes untenable the competitive position of Station KGBR(FM).<sup>4</sup> Chambers alleges that the authorization of these translators is contrary to the Commission's FM allocation policy of bringing full local aural service to all communities, and that there is no rational basis for not affording the permittee of a commercial FM station the same right to protection from interference to its proposed contours from a later-authorized FM translator as is accorded licensees.<sup>5</sup> Chambers takes the position that the termination provision in Section 74.1232(h) of our Rules does not adequately guard the viability of the initiation of a first local FM station against economic harm by an FM translator.<sup>6</sup> Finally, Chambers asserts that the authorization of these translators thwarts the Commission's public interest policy of obligating full service station licensees to serve their communities' needs and, instead, encourages regional concentration of control.

5. At the outset, we affirm that the term "FM radio broadcast station" in Section 74.1232(d) of our Rules,<sup>7</sup> encompasses only operational, and not unbuilt, stations. Accordingly, Section 74.1232(d)(1) proscribes the authorization of a commercial FM translator to the proposed primary station licensee or permittee only where the translator is intended to provide reception beyond the primary station's predicted 1 mV/m contour and within the predicted 1 mV/m contour of an *operational* commercial FM

<sup>4</sup> We note that the Commission's Rules, 47 U.S.C. Sections 74.1201-1284, do not prescribe minimum coverage requirements for FM translators, and that the extent to which these translators actually cover Gold Beach, Oregon is irrelevant to the issue herein.

<sup>5</sup> We note that Chambers claims, without evidentiary support, that there would be interference to Station KGBR(FM)'s signal from these translators pending their termination. Allegations concerning interference to a primary signal are irrelevant to the eligibility of a translator applicant under Section 74.1232(d) of the Rules. See Section 74.1203 of the Rules.

<sup>6</sup> Section 74.1232(h) provides that: "Any authorization for an FM translator station issued to an applicant described in paragraph (d) of this section will be issued subject to the condition that it may be terminated at any time, upon not less than 60 days written notice, where the circumstances in the community or area served are so altered as to have prohibited grant of the application had such circumstances existed at the time of its filing."

<sup>7</sup> See footnote one, emphasis added.

broadcast station assigned to a different principal community.<sup>8</sup>

6. Section 74.1232(d)(1) was incorporated into our FM translator rules in its current form at the time Part 74 was amended to include Subpart L. The underlying rationale for its inclusion was to prevent FM station licensees from using FM translators as a competitive means for extending their stations' service areas. *Report and Order* in Docket 17159, 20 RR 2d 1538, 1541 (1970). In recognition of the fact that FM translators are not being used primarily as "fill-in" devices or as means to provide service to unserved or underserved areas, we have twice explored amending Section 74.1232(d) in order to prevent unfair competition by distant commercial FM stations. In our *Notice of Proposed Rulemaking* in Docket 19918, 44 FCC 2d 794 (1974), we proposed to prohibit competitive expansion of an FM station's service area through either a licensee or non-licensee owned translator where the area to be served was within the predicted 1 mV/m contours of more than one FM station licensed to a community other than that of the primary station. Our main concern was to balance the need to protect the viability of local FM stations with Congress' intent that there be competition in the business of broadcasting. *Id.* at 795. In 1978, we revised our proposal in Docket 19918 to limit primary stations to owning and supporting translators which serve areas only within their 1 mV/m contours, and to permit all other applicants to establish FM translators without restriction as to their intrusion into the predicted 1 mV/m contours of full service commercial FM stations. *Memorandum Opinion and Order and Further Notice of Proposed Rulemaking* in Docket 19918, 43 FR 14695, published April 7, 1978.

7. Consideration of this revised proposal was ultimately concluded last year. Upon review of the record, we determined that our present limitations on FM station-licensee translator ownership and control are adequate. Thus, we declined to amend Section 74.1232(d) and left the rule intact in its current and original form. *Amendment of Part 74, Subpart L of the Commission's Rules Pertaining to FM Radio Broadcast Translator Stations*, 98 FCC 2d 35 (1984). Chambers argues, however, that our policy limiting the protection in Section 74.1232(d)(1) only to licensees of operational commercial FM broadcast stations will result in competitive economic clashes between first-in-time station-owned translators and subsequent first local FM service stations that will adversely affect the

<sup>8</sup> We note that in its reply to BER-TEC's opposition to application for review, Chambers argues that "the restrictions of the rule [Section 74.1232(d)(1)] apply *wherever predicted service exists*, not only where an FM station is in actual operation." [Emphasis in original]. The word "predicted" as used in Section 74.1232(d) is a technical term of art referring to an operating FM station's theoretically predicted contours calculated on the basis of its authorized power and antenna height, as opposed to its actual field strength measurements. The language does not refer to a distinction between an operational and a non-operational station.

viability of the latter stations. We are unpersuaded by this argument. Subpart (h) of Section 74.1232 was proposed in Docket 19918 to provide for retroactive application of subpart (d) "where the circumstances in the community or area served are so altered as to have prohibited grant of the application had such circumstances existed at the time of its filing." In the *Notice* proposing Docket 19918, we set forth an example of a possible future application of subpart (h) which clarifies the applicability of Section 74.1232(d)(1). We referred to a situation where, subsequent to the authorization of a station-owned FM translator serving an area beyond the primary station's predicted 1 mV/m contour more than one FM station commences operation in the latter community.<sup>9</sup> Subpart (h) may be invoked when a full service station licensed to the community being served by a translator begins operation. Therefore, the unbuilt, non-operational status of an FM station does not prohibit authorization of a translator to an applicant described in subpart (d).

8. The explication of this policy in *Peninsula Communications, Inc.*, 50 RR 2d 1135, 1136 (1982), demonstrates the interrelationship of subparts (d) and (h) of Section 74.1232. An FM station petitioned to terminate the operation of an FM translator owned by the licensee of the FM station being rebroadcast beyond its 1 mV/m contour. We stated that authorization of the translator issued to an applicant described in Section 74.1232(d) of the Rules "came within the purview of the termination provision of Section 74.1232(h) as soon as . . . [the full service FM broadcast station licensed to the community being served by the translator] commenced operation." [Emphasis added]. We explained that "Section 74.1232(h) of the rules is permissive in nature and, therefore allows, but does not require, termination of a translator upon a proper showing that the competitive situation in a market is such that the translator is likely to spell the demise of a local full service FM station," and held that "the station's current status as an operating station is some evidence of its ability to survive." *Id.* at 1136-1137.

9. Chambers argues that the burden of the 60-day termination provision notice period, and the costs incurred in petitioning for termination of these translators after Station KGBR(FM) commences operation, would be sufficiently detrimental as to effectively preclude the initiation of this local service. However, applicants for new broadcast stations, as well as assignors of construction permits for unbuilt stations, certify that they have available sufficient net liquid assets to construct and operate the facility for three months without revenue. The additional costs of petitioning for termination of a translator are unlikely to impose a

<sup>9</sup> The reference to "more than one" FM station in this example parallels the proposal in Docket 19918 (discussed above) to amend Section 74.1232(d).

financial hardship sufficient to threaten the viability of a new station even in a small market.

10. Additionally, Chambers alleges that our policy "runs contrary to the theory of preference of a primary signal to a community over a secondary signal." It cites *Harrisclope Broadcasting Corporation*, 38 FCC 2d 328 (1972), for the proposition that it is within the Commission's discretion to review the impact of a translator's operation on the operation of a full service station, and thus there is no assurance in the present case that the protection in Section 74.1232(d)(1) will ultimately be accorded Station KGBR(FM).<sup>10</sup> However, *review* of a petition for termination is not permissive. Rather, *Harrisclope Broadcasting* and *Peninsula Communications* both make clear that upon review of changed circumstances, which, had they existed at the time the translator application was filed would have prohibited a grant, the Commission *may* determine that termination of the translator is not in the public interest. In *Harrisclope Broadcasting* we concluded that the viability of the new local UHF-TV station could be ensured by protecting its programs against duplication by the TV translators serving the same community, and that the public interest in the availability of a wide choice of programs warranted maintaining the translators' authorizations. Thus, where translator service in a community precedes the initiation of a first local FM service, there is an opportunity to assess whether there is a detrimental impact by the translator on the viability of the newcomer FM facility, or whether these stations can competitively co-exist, making available to the public a wider diversity of voices.

11. It is clear that the circumstances of this case do not activate the protection of Section 74.1232(d)(1). Not only was Station KGBR(FM) not operational at the time these translator applications were filed, but contrary to Chambers' representation in its applications for review, the construction permit for that station had not even been granted. Station KGBR(FM) has been authorized since January, 1981, and to this date, remains unbuilt and non-operational. The public interest is best served by permitting FM translator service beyond these primary stations' 1 mV/m contours by the station licensees pending the eventual commencement of operations by Station KGBR(FM).

12. In this regard, and in conclusion, we are unpersuaded by Chambers' argument that our policy for applying the proscription in Section 74.1232(d)(1) of our Rules eschews our policies against regional concentration of control. We note first that we recently repealed the regional concentration of control provisions of the multiple ownership rules. *See*

<sup>10</sup> *Harrisclope Broadcasting* involved the application of Section 74.732(f) of the Rules, which is the termination provision for TV translator stations. Section 74.1232(h) parallels Section 74.732(f).

*Multiple Ownership* (Regional Concentration of Control Provision), 96 FCC 2d 578, 55 RR 2d 1389 (1984). Secondly, Section 74.1232(b) specifically provides that FM translators do not count for purposes of our multiple ownership rules. We reiterate that we believe that our policy best serves the public interest in aural FM broadcast service, our policy best serves the public interest in aural FM broadcast service, and conclude that retroactive application of Section 74.1232(d)(1) via Section 74.1232(h), where there is evidence of a detrimental impact by the translator on the new local FM facility, sufficiently guards against any threat of regional concentration of control or economic competition injurious to the public interest.

13. Accordingly, IT IS ORDERED, that the aforementioned Applications for Review by Chambers Broadcasting ARE HEREBY DENIED.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*