

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

In the Matter of)
Turquoise Broadcasting Company, LLC)
For Construction Permits for New FM Translator)
Stations:)
K276FF, Seward, Alaska) File No. BNFPT-20030820ABE
Facility ID No. 142638
K259BK, Seward, Alaska) File No. BNFPT-20030820AAT
Facility ID No. 145986
K281AZ, Seward, Alaska) File No. BNFPT-20030820AAX
Facility ID No. 142643
K271AY, Delta Junction, Alaska) File No. BNFPT-20030821AAA
Facility ID No. 142108
K281BA, Delta Junction, Alaska) File No. BNFPT-20030821AAR
Facility ID No. 142114
New, Seward, Alaska) File No. BNFPT-20030819ACP
Facility ID No. 142622

MEMORANDUM OPINION AND ORDER
AND DECLARATORY RULING

Adopted: February 7, 2008

Released: February 11, 2008

By the Commission:

I. INTRODUCTION

1. The Commission has before it an Application for Review filed October 18, 2005, by Northern Radio, Inc. ("NRI"). NRI seeks review of a September 27, 2005, staff decision denying NRI's Petitions for Reconsideration in the above-captioned FM translator licensing proceedings. We also have before us a Request for Declaratory Ruling filed on February 2, 2005, by NRI's counsel, David Tillotson, Esq. ("Tillotson") which raises similar issues to those presented by NRI's Application for Review. For the reasons set forth below, we grant, to the extent indicated herein, Tillotson's Request for Declaratory Ruling, and deny NRI's Application for Review.

II. BACKGROUND

2. Seward Applications. Turquoise Broadcasting Company, LLC ("TBC") filed an application for a construction permit for a new Seward, Alaska, FM translator station operating on

Channel 231 (the “New Seward Station”) on August 19, 2003. On August 20, 2003, TBC also filed applications for construction permits for three other new Seward FM translator stations, subsequently authorized as K276FF, K259BK, and K281AZ (the “Seward Stations”). On September 9, 2003, NRI, as the licensee of Alaska radio stations,¹ petitioned to deny each of the applications, alleging that the New Seward Station and the Seward Stations would violate Section 74.1231(g) of the Commission’s Rules (the “Rules”)² because TBC sells advertising time on another translator station, K290AA, off of a rate card. In support of its allegations, NRI referenced TBC’s website for Station K290AA, which displays the rates at which commercial messages may be purchased for broadcast on that station. NRI alleged that TBC’s “*raison d’etre*” is to profit from the operation of translator stations by selling commercials on those stations.³ In addition, NRI alleged that the New Seward Station would receive financial support from its primary commercial station, KXBA(FM), Nikiski, Alaska, in violation of Section 74.1232(e) of the Rules.⁴

3. The Media Bureau (the “Bureau”) dismissed the Petition to Deny the New Seward Station application on January 18, 2005, concluding that NRI had failed to provide evidence of any rule violation.⁵ NRI filed a Petition for Reconsideration on February 2, 2005. The Bureau denied the Petitions to Deny the Seward Stations’ applications on February 23, 2005, concluding that NRI had failed to demonstrate that the proposed Seward Stations would violate Section 74.1231(g) of the Rules.⁶ Specifically, the Bureau found that NRI did not submit any evidence that TBC would broadcast commercials over the Seward Stations, or that the commercials broadcast on Station K290AA violated Section 74.1231(g) of the Rules. The Bureau granted the Seward Stations’ construction permits on the same date.⁷ NRI filed Petitions for Reconsideration on March 11, 2005, reiterating the allegations that it had raised in the Petitions to Deny.

4. *Delta Junction Applications.* On August 21, 2003, TBC filed applications for construction permits for new FM translator in Delta Junction, Alaska, subsequently authorized as Stations K271AY and K281BA (the “Delta Junction Stations”). On October 29, 2003, NRI filed a Petition to Deny each application. The Petitions raised the same allegations as the Petitions to Deny the New Seward Station and the Seward Stations applications. NRI also alleged that TBC proposed to feed the Delta Junction Stations by satellite, internet, or other “alternate” signal delivery means, in violation of

¹ On September 18, 2006, NRI assigned its Stations KSWD(AM) and KSWD-FM to Seward Media Partners, LLC (File No. BAL-20060616AAQ). On March 22, 2007, NRI assigned Station KFSE(FM) to KSRM, Inc. (File No. BAPH-20060615ACZ).

² 47 C.F.R. § 74.1231(g) (limiting announcements of financial support over translator stations to those “deemed necessary to the continued operation of the translator” and “to a total of 30 seconds an hour...Solicitations of contributions shall be limited to the defrayal of the costs of installation, operation and maintenance of the translator or acknowledgements of financial support for those purposes. Such acknowledgements may include identification of the contributors, the size and nature of the contributions and advertising messages of contributors.”).

³ Petition to Deny at 3-5.

⁴ 47 C.F.R. § 74.1232(e) (“An FM translator station whose coverage contour goes beyond the protected contour of the commercial primary station shall not receive any support, before or after construction, either directly or indirectly, from the commercial primary FM radio broadcast station....”).

⁵ *Letter to Gary A. Rose from George H. Gwinn, Audio Division, Media Bureau, Federal Communications Commission* (Jan. 18, 2005). The staff did not grant the New Seward Station application because TBC had not yet received the appropriate Commission registration for its proposed antenna tower. The letter notified TBC of this deficiency and requested that it complete the registration process. The application remains pending.

⁶ *Letters to Turquoise Broadcasting from James D. Bradshaw, Deputy Chief, Audio Division, Media Bureau, Federal Communications Commission* (Feb. 23, 2005).

⁷ *Id.*

Section 74.1231(b) of the Rules.⁸ The Bureau denied the Petitions to Deny on February 24, 2005, concluding that: (1) NRI had failed to demonstrate that the Delta Junction Stations would violate Section 74.1231(g) of the Rules; and (2) TBC had requested and justified a waiver of Section 74.1231(b) of the Rules.⁹ The Bureau granted the construction permits for the Delta Junction Stations on the same date. NRI filed Petitions for Reconsideration of those actions on March 14 and March 30, 2005, restating the allegations that it had made in the Petitions to Deny.

5. In a consolidated decision, the Bureau denied NRI's several Petitions for Reconsideration on September 27, 2005,¹⁰ concluding that those Petitions failed to show a material error or omission in the original decision and did not raise additional facts unknown or not existing until after NRI's last opportunity to present such matters.¹¹ On October 18, 2005, NRI filed the subject Application for Review of the staff decision denying the Petitions for Reconsideration. Tillotson, NRI's counsel, also filed the subject Request for Declaratory Ruling on February 2, 2005, asking the Commission to clarify whether an FM translator licensee's sale of advertisements with the use of a rate card would violate Section 74.1231(g) of the Rules.

III. DISCUSSION

6. *Request for Declaratory Ruling.* Pursuant to Section 1.2 of the Rules,¹² we will entertain a request for declaratory ruling if a controversy or uncertainty exists that will be terminated by the issuance of a declaratory ruling.¹³ Tillotson's Request for Declaratory Ruling asks the Commission to clarify: (1) whether it is permissible for the licensee of an FM translator station to sell time for advertising messages on the station off of a rate card; and (2) if so, whether a licensee may earn revenue from such sales in excess of the amount needed to defray the station's operating costs. For the reasons discussed below, we grant Tillotson's Request for Declaratory Ruling and offer the following clarification.

7. *Use of Rate Cards.* Section 74.1231(g) of the Rules specifically allows FM translator stations to originate acknowledgements of contributions. These acknowledgements may include the identification of the contributors, the size or nature of the contribution, and the "advertising messages of contributors."¹⁴ On November 8, 1990, the Commission amended the FM translator rules to promote supplemental service to areas in which direct reception of FM radio broadcast stations is unsatisfactory

⁸ 47 C.F.R. § 74.1231(b) ("An FM translator may be used for the purpose of retransmitting the signal of a primary FM radio broadcast station or another translator station the signal of which is received directly through space, converted, and suitably amplified.").

⁹ *Letters to Turquoise Broadcasting from James D. Bradshaw, Deputy Chief, Audio Division, Media Bureau, Federal Communications Commission* (Feb. 24, 2005). The Bureau found that the proposed Delta Junction translator stations would serve a "commercial white area" – an area currently receiving no commercial aural signals, and therefore, that waiver of the signal delivery rule was warranted.

¹⁰ *Letter to Turquoise Broadcasting from James D. Bradshaw, Deputy Chief, Audio Division, Media Bureau, Federal Communications Commission* (Sep. 27, 2005).

¹¹ 47 C.F.R. § 1.106(c).

¹² 47 C.F.R. § 1.2.

¹³ See, e.g., *In the Matter of Petition for Declaratory Ruling that Pulver.com's Free World Dialup Is Neither Telecommunications nor a Telecommunications Service*, Memorandum Opinion and Order, 19 FCC Rcd 3307, 3311 n.24 (2004) (declaratory ruling issued to resolve "controversy or uncertainty").

¹⁴ See n. 1 *supra*.

due to distance or terrain barriers.¹⁵ In the *1990 Order*, the Commission stated that translators must be allowed to raise funds and that “some information about contributors must be allowed in order to enable translators to encourage donations.”¹⁶ In a 1993 proceeding disposing of petitions for reconsideration of the *1990 Order*, the Commission specifically declined to adopt restrictions on the content of announcements acknowledging support, such as those which limit underwriting announcements aired on noncommercial educational broadcast stations.¹⁷ Thus, the Commission provided broad discretion to FM translator licensees to raise funds.¹⁸ Neither the Rules nor Commission policy prohibits the use of rate cards, or the airing of commercial “spot” announcements purchased off of a rate card, as means to solicit contributions. Accordingly, the use of rate cards by an FM translator station is not a *per se* violation of Section 74.1231(g) of the Rules.

8. Defrayal of Costs Limitation. Prior to the *1990 Order*, licensees were not allowed to operate translator stations for profit. However, when the current language of Section 74.1231(g) of the Rules was adopted in the *1990 Order*, the Commission specifically noted that “the new rules no longer require licensees of FM translators to operate non-profit facilities.”¹⁹ Nevertheless, Section 74.1231(g) continues to impose limitations on a translator licensee’s broadcast of solicitations for funds in two respects. First, such announcements are limited to 30 seconds per hour. Additionally, “[s]olicitations of contributions shall be limited to the defrayal of the costs of installation, operation, and maintenance of the translator or acknowledgements of financial support for those purposes.”²⁰ Thus, revenues from sales of advertising time cannot exceed these costs.

9. Application for Review. On review, NRI seeks a Commission clarification on three policy questions regarding general restrictions on the fundraising activities of FM translator stations, two of which have been discussed above: (1) whether it is permissible for the licensee of an FM translator station to sell time for advertising messages on the station off of a rate card; and (2) if so, whether a licensee may earn revenue from such sales in excess of the amount needed to defray the station’s operating costs. NRI also asks whether the Commission’s 1984 *Guide to FM Translator Rules and Policies*²¹ is still an accurate statement of Commission policy regarding the nature of “commercial announcements” which a licensee may broadcast on its FM translator station. NRI contends that, should the Commission agree with its rule interpretation, TBC’s sale of advertising on translator Station K290AA violated Section 74.1231(g), and TBC is accordingly unqualified to be the licensee of additional translator stations. NRI states that the Bureau failed to address the issues presented in its Petition to Deny and subsequent petitions for reconsideration, and it requests that the staff grants be overturned and the applications for the subject translator stations denied.

10. 1984 Guide to FM Translator Rules and Policies. NRI first asks whether the Commission’s 1984 *Guide to FM Translator Rules and Policies* is still an accurate statement of Commission policy regarding the nature of “commercial announcements” which a licensee may broadcast

¹⁵ *Amendment of Part 74 of the Commission’s Rules Concerning FM Translator Stations*, Report and Order, 5 FCC Rcd 7212 (1990) (“*1990 Order*”).

¹⁶ 5 FCC Rcd at 7218.

¹⁷ *Amendment of Part 74 of the Commission’s Rules Concerning FM Translator Stations*, Memorandum Opinion and Order, 8 FCC Rcd 5093, 5097 (1993) (“*1993 Order*”).

¹⁸ *Id.*

¹⁹ *1990 Order*, 5 FCC Rcd at 7244 n. 47.

²⁰ 47 C.F.R. § 74.1231(g).

²¹ *Guide to FM Translator Rules and Policies*, 55 RR 2d 1247 (1984).

on its FM translator station. Clearly, it is not. The *1990 Order*, which discussed the fundraising limitations on FM translator stations at length, explicitly superseded the *Guide to FM Translator Rules and Policies*.²² In the Commission's 1993 Order affirming and clarifying the FM translator rules adopted by the *1990 Order*, the Commission again stated that the 1990 rule changes superseded the *Guide to the FM Translator Rules and Policies*.²³

11. NRI's remaining policy questions are also presented in Tillotson's Request for Declaratory Ruling, and were discussed above. In light of that discussion, we conclude that NRI has failed to show that the practices of which it complains constitute either a violation of the Rules or raise a substantial and material question of fact regarding TBC's qualifications to remain a Commission licensee. As observed above, the use of rate cards by an FM translator station is not a *per se* violation of Section 74.1231(g) of the Rules. Moreover, while revenues from the sale of advertising time cannot exceed the costs of installation, operation, and maintenance of the translator station, NRI has provided no evidence to establish that TBC has violated the limitations imposed by Section 74.1231(g) of the Rules. NRI provides no documentation concerning TBC's advertising billing, collections, or revenue figures. Rather, NRI simply references TBC's October 15, 2003, Opposition to its Petition to Deny, arguing:

TBC's opposition left no room for doubt that, if TBC is awarded licenses for new translator stations, it will sell commercials on those stations off of a published rate card and the amount of such commercials that TBC sells will not be limited to the amount TBC needs to "defray" operating expenses.²⁴

NRI's argument is premised on its interpretation of language in TBC's Opposition, which, in fact, makes no explicit or even tacit admission that it currently solicits contributions in excess of its costs, and then NRI speculates as to TBC's future conduct. These are insufficient to establish a violation of Section 74.1231(g).

IV. ORDERING CLAUSES

12. Accordingly, IT IS ORDERED, that David Tillotson's February 2, 2005, Request for Declaratory Ruling IS GRANTED to the extent indicated herein and otherwise DENIED.

13. Accordingly, IT IS FURTHER ORDERED, that Northern Radio, Inc.'s October 18, 2005, Application for Review IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

²² *1990 Order*, 5 FCC Rcd at 7217, 7219 & 7244 nn.40 & 47.

²³ *1993 Order*, 8 FCC Rcd at 5096 n.19.

²⁴ Application for Review at 3.