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California State University, Long Beach Foundation
6300 E. State University Drive, Suite 332
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In Re: KKJZ(FM), Long Beach, CA
Facility ID #8197
California State University, Long Beach
Foundation ("CSULB")
BPED-20070905ABF
Petition for Reconsideration

Dear Applicant:

This letter is in reference to: (1) the above-captioned minor change construction permit dismissed on December 17, 2007; (2) the January 22, 2008 Petition for Reconsideration filed by CSULB, licensee of KKJZ, Long Beach, CA, seeking reinstatement of the application; (3) the February 7, 2008 Opposition to Petition for Reconsideration filed by Santa Monica Community College District ("SMCC"); and (4) all other related pleadings. For the reasons set forth herein, we deny the Petition for Reconsideration.

Background. By letter dated December 17, 2007, the staff informed CSULB that KKJZ's proposed facilities would result in prohibited contour overlap with co-channel Class B1 license (BLED-20000518AAZ) for KCRY(FM), Mojave, CA, in violation of 47 C.F.R. § 73.509. Specifically, the proposed protected contour (60 dBu) would receive prohibited overlap from the interfering contour (40 dBu) of KCRY's facility between the azimuths from 299°T to 79°T. KKJZ recognized this violation and requested waiver of the contour overlap provisions of § 73.509. Furthermore, CSULB included a supplemental analysis based on Longley-Rice calculations to prove that the prohibited contour overlap would not actually exist. We concluded that acceptance of the supplemental showing was not warranted. Specifically, we pointed out that in *Certain Minor Changes Without a Construction Permit*, 12 FCC Rcd 12371, 12401-12403, the Commission stated its policy with respect to supplemental showings pertaining to interference calculations:

First and foremost, we want to emphasize that supplemental showings have not been accepted, nor will be accepted, for the purpose of demonstrating interference or prohibited contour overlap between FM broadcast stations. ... To employ supplemental showings in this manner would

represent a fundamental change as to how contour protection applications are processed, and would require a separate rulemaking proceeding to specify standards, methods and assumptions, and possibly revised definitions for protected service areas and interference.

That policy has not changed.¹ Nor has the applicant provided compelling justification why the longstanding prohibition against using supplemental analyses for predicting interference or contour overlap in the FM radio service should be set aside in this instance, apart from the obvious fact that such results favor the applicant. Therefore, we denied the request for waiver of Section 73.509 and dismissed the application, having given the application the “hard look” called for under *WAIT Radio*.²

Petition for Reconsideration. On January 22, 2008 CSULB submitted a Petition for Reconsideration again requesting waiver of § 73.509 to accept a more sophisticated and accurate analysis of the facts. CSULB claims that the Commission failed to discuss several critical points raised in its Opposition to Informal Objection. CSULB also states that the precedent relied on by the Bureau is now 10 years old and superseded in action taken by both Congress and the Commission that recognizes the sophistication of modern computers and the increased efficient use of the spectrum that results from the use of modern computer analysis.³ In addition, CSULB believes that these modern computer analyses demonstrate that zero interference is received from KCRY. Finally, CSULB argues that KCRY acts as a repeater for KCRW, while KKJR has a longstanding and unique mainstream jazz programming format that needs to reach more listeners to economically healthy. Therefore, CSULB requests that the Bureau accept its application for filing and grant waiver to the extent necessary.

Opposition to Petition for Reconsideration. On February 7, 2008, SMCC filed an Opposition to CSULB’s Petition for Reconsideration. SMCC states that the FCC Letter fully addressed CSULB’s waiver request and afforded it the full consideration required under *WAIT Radio*. SMCC claims that Commission made clear that alternative terrain showings will not be accepted for purposes of determining interference or prohibited contour overlap. Furthermore, CSULB believes that to accept such supplemental showings would constitute a fundamental change in the Commission’s processing of FM applications, and, therefore, would require a separate rulemaking proceeding to change the Commission’s processing procedures. Finally, SMCC asserts that

¹ In MM Docket 98-93, the Commission initiated consideration of the point-to-point propagation method for use in the FM service. However, in the *Second Report and Order* in MM Docket 98-93, 15 RCD 16149 (2000) at Paragraph 8, the Commission stated that it was likely that “several program modifications” were under consideration that could affect the results obtained from the analysis. As of this time the point-to-point method is still being reviewed.

² When an applicant seeks waiver of the rules, it must plead with particularity the facts and circumstances which warrant such action. *Columbia Communications Corp. v. FCC*, 832 F.2d 189, 192 (D.C. Cir. 1987) (quoting *Rio Grand Family Radio Fellowship, INC. v. FCC*, 406 F.2d 644, 666 (D.C. Cir. 1968) (per curiam)). We have afforded your waiver request the “hard look” called for under *WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969), but find that the facts and circumstances presented are not sufficient to warrant waiver of Section 73.509.

³ CSULB cites the Satellite Home Viewer Act of 1999 and *e.g. Hemet, California*, DA 07-4504 (M.B. rel. Nov. 2, 2007).

CSULB has not even attempted to show that the Bureau abused its discretion in refusing to depart its longstanding policy regarding the unacceptability of alternative terrain showings without a formal notice and comment rulemaking adopting such a rule change. Accordingly, SMCC believes that the Bureau should not grant reconsideration.

Discussion. We address CSULB's comments on its programming first. The Commission has long refused to grant waivers of technical rules based on non-technical considerations. In *Open Media Corporation*, the Commission stated as follows:

[E]ven though [the applicant] seeks to achieve what it believes to be a commendable objective, it is well established that our policy of refusing to base waivers of rules designed to prevent interference upon non-technical considerations such as ownership or programming is a rational implementation of our mandate to "[m]ake such regulations not inconsistent with law as [we] may deem necessary to prevent interference between stations." 47 U.S.C. Section 307(f). This policy has been approved by the courts. [several citations omitted]

Consequently, no weight was given to considerations of programming or mission in evaluating CSULB's waiver request of § 73.509 before its application was dismissed, nor will they be considered here in support of the waiver request.

CSULB is correct that we did not consider the critical points of its supplemental analysis before dismissing the application. Such a review would have been superfluous. The Commission clearly stated its policy against the acceptance of supplemental studies for the prediction of interference (or lack thereof) in *Certain Minor Changes Without a Construction Permit*, and stated its reasons for not accepting such studies. No FM application has been granted to date based on interference studies computed by supplemental studies using Longley-Rice or similar methods. CSULB's suggestion that the Commission should consider such studies piecemeal ignores the complex realities of such an approach. In particular, CSULB's terrain-blocked situation is certainly not unique, as there are literally hundreds of stations with terrain blockages in one direction or more. It is quite possible that many more new or changed stations could be authorized using supplemental analyses. However, these new or changed stations would not be adequately protected from interference under our present rules.⁴ Moreover, § 73.509 is the Commission's primary vehicle for ensuring compliance with the fair and equitable of stations under the Communication Act. It is unclear what impact stations authorized under alternate

⁴ For example, a licensed noncommercial educational station is entitled to maintain its authorized protected and interfering contours in a given direction. In the present instance, it might be possible for SMCC to use a directional antenna atop the intervening terrain obstruction while maintaining its existing 40 dBu interference contour toward CSULB. Were such a change to be implemented – a change that would be acceptable under our present rules – the terrain blockage would be removed and CSULB's proposed station would suddenly be faced with increased interference and diminished coverage, and without recourse to object. Conversely, were SMCC required to protect the proposed CSULB station; it would reduce SMCC's range of potential transmitter sites from which it could operate. It would also force SMCC to conduct its own supplemental analyses against CSULB for any change it might want to make, such as increasing antenna height. A requirement of this sort is not contemplated by our present rules.

prediction methodologies would have on this balance. Different supplemental methods make different assumptions about the effects of intervening terrain and other variables and may come up with a different result. Simple fairness demands a procedure all can use to come up with consistent results. These considerations, and more, can only be properly considered in the context of a notice-and-comment rulemaking focused on the FM service. At the present time, there is no rulemaking on the subject likely to produce a workable mechanism in the near future.

Conclusion. Accordingly, the January 22, 2008 Petition for Reconsideration filed by California State University, Long Beach IS HEREBY DENIED. This action is taken pursuant to 47 C.F.R. § 0.283.

Sincerely,

A handwritten signature in black ink, appearing to read "Rodolfo F. Bonacci". The signature is fluid and cursive, with a prominent initial "R" and a long, sweeping underline.

Rodolfo F. Bonacci
Assistant Chief
Audio Division
Media Bureau

cc: Peter Tannenwald, Esq.
Clarence M. Beverage, Engr.