



Federal Communications Commission  
Washington, D.C. 20554  
March 8, 2012

*In Reply Refer to:*  
1800B3-DEB/TSN

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In re: **KMIH(FM), Mercer Island,  
Washington**  
Facility ID No. 41205  
File No. BMPED-20071228ABS

**Application for Minor Modification of  
Construction Permit**

Dear Counsel:

We have before us a Petition for Reconsideration (“Petition”) of the staff’s July 22, 2008,<sup>1</sup> dismissal of the above-captioned application for modification of the construction permit for Class D noncommercial educational (“NCE”) FM broadcast station KMIH(FM) (“KMIH”),<sup>2</sup> filed by licensee Mercer Island School District #400 (“MISD”). MISD proposes in the Application to convert the Class D secondary facilities authorized in KMIH’s most recent construction permit to Class A,<sup>3</sup> without technical

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<sup>1</sup> *Nick De Vogel, General Manager, KMIH(FM), Letter (MB July 22, 2008) (“Staff Decision”).*

<sup>2</sup> File No. BMPED-20071228ABS (the “Application”).

<sup>3</sup> File No. BLED-20060327AIM. KMIH was granted a license, File No. BLED-20081014AFI, to cover this construction permit on January 8, 2009.

changes.<sup>4</sup> Pacific Lutheran University, Inc. (“PLU”), licensee of NCE FM station KPLU-FM, Tacoma, Washington, and Seattle Public Schools (“SPS”), licensee of NCE FM station KNHC(FM), Seattle, Washington,<sup>5</sup> both filed informal objections to the Application. MISD timely filed the Petition on August 25, 2008, with PLU and SPS both filing oppositions to the Petition on September 8, 2008, to which MISD filed a reply on September 22, 2008. For the reasons set forth below, we conclude that reinstatement of the application is not warranted, and MISD’s Petition is denied.

**Background.** In the *Staff Decision*, we concluded that MISD’s Application to modify KMIH as a Class A station failed to protect an earlier-filed NCE window application for a new NCE FM station at Skykomish, Washington,<sup>6</sup> pursuant to Section 73.509 of the Commission’s Rules.<sup>7</sup> We considered MISD’s supplemental showing and waiver request, but concluded that neither was sufficiently compelling to warrant grant.

MISD forwards several arguments in its Petition why the Application should not have been dismissed. First, MISD claims it never specifically asked for waiver of Section 73.509, contrary to the statement in the *Staff Decision*.<sup>8</sup> Second, MISD defends its filing to upgrade Class D station KMIH to Class A via a minor change application, citing a 2007 settlement letter in which a similar application was granted.<sup>9</sup> Third, MISD argues that the conflicting Skykomish application is neither a license, permit, nor an allotment, and therefore need not be protected under the provisions of Section 73.509. At a minimum, MISD contends, its application should be reinstated and deferred until after final action is taken on the Skykomish proposal (which MISD opines would be denied in any event). MISD also contends that the considerations “discussed at length in MB Docket No. 02-136 ... make the public interest case for a grant of the relief requested in the Petition for Reconsideration.”<sup>10</sup> MISD also argues that the contentions in PLU’s and SPS’s oppositions do not raise any issue that would warrant denial of its proposal. Lastly, MISD “confirms” that it is not attempting to evade the construction permit conditions imposing a duty on MISD to resolve any interference caused by KMIH to KPLU-FM or KNHC(FM).

PLU states that the staff acted properly in dismissing the Application. It disputes MISD’s conclusion that Section 73.509 cannot be applied to the Skykomish application, citing the *NCE Point*

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<sup>4</sup> KMIH’s grandfathered Class D facilities are 0.030 kW effective radiated power (ERP) at 69 meters antenna height above average terrain (HAAT). With these parameters, KMIH’s reference 60 dB $\mu$  (1 mV/m) contour extends 6.3 km in radius. Because the reference distance exceeds 6 km, KMIH believes its facilities can be reclassified to Class A. See 47 C.F.R. §§ 73.511(a) and 73.211(a)(3).

<sup>5</sup> SPS’s original pleading was filed as a petition to deny. However, a petition to deny does not lie against a minor modification application. Thus, we treated this “petition to deny” as an informal objection pursuant to 47 C.F.R. Section 73.3587. See *Staff Decision* at 1 n.2.

<sup>6</sup> File number BNPED-20071012ATS, Facility ID No. 172775.

<sup>7</sup> 47 C.F.R. § 73.509.

<sup>8</sup> *Staff Decision* at 1-2.

<sup>9</sup> *Living Proof, Inc., University of Massachusetts, CSN International, and Maynard School Committee*, Letter, Ref. No. 1800B3-KD (MB July 25, 2007).

<sup>10</sup> Reply to Oppositions to Petition for Reconsideration (“MISD Reply”) at 5.

*System Report and Order*,<sup>11</sup> which states that proposals received inside the filing window period will be protected from applications filed after the window closes. PLU further points out that MISD had the opportunity to file its proposal within the NCE window filing period. Moreover, because MISD's proposal violated the Commission's contour protection rules and policies, contends PLU, a request for waiver was essential, and a failure to request waiver of Section 73.509 was fatal to MISD's proposal. PLU cites *Lakeside Communications, Inc.*,<sup>12</sup> in which the Commission denied a request to upgrade from Class D to Class A where the provisions of Section 73.509 were not met.

For its part, SPS references its earlier informal objection to the Application, reiterating that MISD "is attempting to circumvent clear conditions currently in place on KMIH's construction permit,"<sup>13</sup> that "the only reasons for the proposed change in service class would be inconsistent with these conditions," and moreover the change in class is unnecessary to facilitate KMIH's continuing operations.<sup>14</sup>

**Discussion. *Petition for Reconsideration.*** MISD contends that the provisions of Section 73.509 are "not cognizable" with respect to the previously filed (and then-pending) Skykomish application. We note that, subsequent to MISD's filing its Petition, the Skykomish application was dismissed on May 13, 2009, thus mooting the basis of MISD's Petition. Nevertheless, MISD's argument, refusing as it does to recognize the priority of the Skykomish application over MISD's later-filed Application,<sup>15</sup> is sufficiently disingenuous as to merit some discussion. MISD claims that Section 73.509(b) does not apply to its Application because KMIH is a Class D station changing station class, and Section 73.509(a) does not apply because the Skykomish application was not a "station" (meaning a construction permit or license), but merely an application for a new NCE station, and thus need not be protected. MISD thus appears to argue that it need never protect prior-filed proposals for new or modified service, only authorized facilities.

MISD's argument that a prior-filed application is not a "station" meriting protection from MISD's Application is based on an attempt to analogize *Central Florida Educational Foundation, Inc.*,<sup>16</sup> and related cases, in support of its claim that pending but ungranted applications are merely proposals, and therefore undeserving of protection, because they are not tantamount to authorized facilities. The line of cases including *Central Florida* involved applicants for new NCE FM and AM stations filing minor amendments proposing changes of community of license under Section 73.3573(g) of the Rules.<sup>17</sup> Such

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<sup>11</sup> *In the Matter of Reexamination of the Comparative Standards for Noncommercial Educational Applicants*, Report and Order, 15 FCC Rcd 7386, 7422 (2000) ("*NCE Point System Report and Order*"), on recon. 16 FCC Rcd 5074, 16 FCC Rcd 10549 (2001), vacated in part, *National Public Radio, Inc. v. F.C.C.*, 254 F.3d 226 (D.C. Cir. 2001). See PLU Opposition to Petition for Reconsideration ("*PLU Opposition*") at 4-7.

<sup>12</sup> *Lakeside Telecommunications, Inc.*, Memorandum Opinion and Order, 20 FCC Rcd 763 (2004) (application for review denied for Class D station seeking waiver of contour protection rules for co-channel overlap).

<sup>13</sup> File No. BPED-20060329AIM. See SPS Reply to Petition for Reconsideration ("*SPS Opposition*") at 2.

<sup>14</sup> *Id.*

<sup>15</sup> Petition at 5.

<sup>16</sup> Letter, 23 FCC Rcd 1695 (MB 2008) ("*Central Florida*").

<sup>17</sup> 47 C.F.R. § 73.3573(g).

an application or amendment must, under the rule, be mutually exclusive with the applicant's current facilities or current assignment.<sup>18</sup> A number of applicants with pending, non-rule-compliant applications attempted to avail themselves of the then-newly adopted minor modification change of community procedures by proposing new facilities that were mutually exclusive with the facilities they had originally proposed, in an effort to bring their proposals into compliance. The staff found that an applicant-defined proposal was not the equivalent of a "current assignment," such as an FM allotment, that had been studied and approved by the Commission, and thus could not form the basis for a minor change amendment or application to specify a new community of license.<sup>19</sup> This finding, however, was limited to its specific factual context, namely, a minor modification application to change community of license in a non-tabled service. It is at best an unwarranted leap of logic for MISD to try to extend this finding to imply that a pending but as-yet ungranted application for new service does not warrant protection from later-filed proposals. We therefore reject this argument which, in any event, ignores the plain language of the *NCE Point System Report and Order*, protecting timely filed NCE window applications from later-filed minor modification applications.<sup>20</sup>

MISD's application was thus correctly dismissed under the provisions of Section 73.3573(e).<sup>21</sup> However, on our own motion, we take notice of the May 13, 2009, dismissal of the Skykomish application. Accordingly, we consider this application pursuant to the processing policy set forth in the Commission's 1984 *Public Notice*.<sup>22</sup>

*Application proposal, post-Skykomish dismissal.* As presently licensed as a Class D station, KMIH creates a small "hole" of prohibited contour overlap within the protected service area of PLU's second-adjacent channel station KPLU-FM. Similarly, KMIH creates a small "hole" of prohibited contour overlap within the protected service area of third-adjacent channel station KNHC(FM).<sup>23</sup> Each of these contour overlaps is contrary to the requirements of Section 73.509.<sup>24</sup> MISD suggests that the class change is needed to prevent future applications like the Skykomish proposal from putting KMIH's continued service in jeopardy.<sup>25</sup> MISD also submits that KNHC(FM) and KPLU-FM will continue to be

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<sup>18</sup> *Id.* § 73.3573(g)(2).

<sup>19</sup> See *Central Florida*, 23 FCC Rcd at 1700 n.43. See also *Rivers, L.P.*, Letter, 23 FCC Rcd 4521, 4522-23 (MB 2008).

<sup>20</sup> See *supra* note 11. PLU is also correct when it argues that MISD's proposal required consideration of a Section 73.509 waiver. The Application clearly could not avoid prohibited contour overlap with the Skykomish proposal, as well as with KPLU-FM and KNHC(FM). If MISD did not explicitly seek waiver of Section 73.509, then its application warranted summary dismissal for failure to make such a request.

<sup>21</sup> Although the *Staff Decision* did not specifically cite 47 C.F.R. § 73.3573(e), it correctly described the violation.

<sup>22</sup> *Commission States Future Policy on Incomplete and Patently Defective AM and FM Construction Permit Applications*, Public Notice, FCC 84-366, 56 RR 2d 776, 49 FR 47331 (1984).

<sup>23</sup> KMIH's 100 dB $\mu$  interfering contour lies wholly within the 60 dB $\mu$  protected service contour of KNHC(FM).

<sup>24</sup> Specifically, KMIH's 100 dB $\mu$  interfering contour lies wholly within the 60 dB $\mu$  protected service contour of KPLU-FM.

<sup>25</sup> There is also some justification included with MISD's pleadings for filing this class change as a minor change as opposed to a major change application, and some discussion in the pleadings on both sides as to whether MISD should have filed its Class A proposal during the 2007 NCE application filing window. See, e.g., PLU Opposition at

protected from interference by the conditions on its 2006 construction permit, which it believes would carry over to the present proposal.

SPS argues that MISD is trying to evade the conditions placed on KMIH when it was granted a limited waiver of Section 73.509 in the 2006 construction permit.<sup>26</sup> At that time, the staff expressly stated it was not changing KMIH's Class D secondary status, nor was it imposing protection requirements on KNHC(FM) or KPLU-FM, and that KMIH was responsible either to eliminate promptly any interference complaints, or to cease operations in the event the interference complaints could not be resolved. SPS speculates that MISD's aim in reclassifying KMIH as a Class A station is to gain interference protection for that station (which KMIH does not have as a secondary Class D station), or is an incremental step toward increasing service area, both of which SPS opposes. SPS further argues that there are no legitimate reasons to change KMIH's station class now, particularly since MISD failed to upgrade KMIH to Class A in the past.

Similarly, PLU refers to the 2006 KMIH construction permit application and the conditions imposed on that permit in the *KMIH Grant Letter*. PLU contends that MISD is attempting to "bootstrap" its way to a Class A station and ignore or eliminate the conditions imposed on its 2006 construction permit. PLU also believes that MISD is trying to obtain increased protection from interference for KMIH, at the expense of KPLU-FM.

We recognize that MISD has engaged in a long and so far fruitless search for facilities that would enjoy the protections afforded to primary stations. In this respect, KMIH is not unlike numerous Class D NCE stations across the country (as well as many higher-class NCE stations), that are predominantly sited in crowded urban areas and have no opportunity to improve their facilities without causing increased prohibited contour overlap to other FM broadcast service stations, in violation of Section 73.509. The fact that a Class D station cannot change facilities in compliance with the FCC's contour protection rules, however, is not in and of itself sufficient justification to waive those rules.<sup>27</sup>

Further, we cannot agree with MISD's contention that changing KMIH from Class D to Class A would not change PLU's and SPS's rights to protection from interference to KPLU-FM and KNHC(FM), respectively. MISD has pledged to abide by the interference condition to which it agreed on its construction permit, and we have no reason to doubt MISD's sincerity in assuring that KMIH's operations will continue to be governed by that condition. Nevertheless, rule and precedent require secondary Class D stations actively to take steps to eliminate interference, up to and including frequency changes and cessation of operations. Class A stations are not subject to such rigid restrictions. This distinction cannot be lightly dismissed, especially in light of the requested waiver's significance.

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9-10, citing *Media Bureau Announces NCE FM New Station and Major Change Filing Procedures for October 12-October 19, 2007 Window*, Public Notice, 22 FCC Rcd 15050, 15052 (MB 2007). The Commission's Rules do not distinguish between Class D and other station classes insofar as upgrading to a higher class is concerned. A minor change application is acceptable for accomplishing this goal in the reserved band, and has always been so. In any event, this issue has no bearing on our decision.

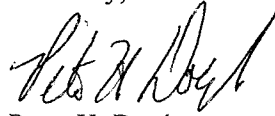
<sup>26</sup> Construction permit, File No. BPED-20060327AIM, granted September 20, 2006, now licensed under file number BLED-20081014AFI. See *Howard J. Barr, Esq., Aaron A. Hurowitz, Esq., and Todd D. Gray, Esq.*, Letter, Ref. No. 1800B3-RDH (MB Sept. 20, 2006) ("*KMIH Grant Letter*"), released concurrently with the KMIH construction permit.

<sup>27</sup> See *supra* note 12.

Nor are there compelling public interest factors in support of this proposal. As MISD acknowledges, KMIH will neither gain service area or population nor reduce existing prohibited contour overlap (and hence potential interference) through this proposal. KMIH's existing Class D service is neither presently threatened nor the subject of controversy. As indicated in the *Staff Decision*, programming format is not a factor to be considered when evaluating waiver of a technical rule.<sup>28</sup> We therefore conclude that there are no significant factors that merit grant of this upgrade application, and we thus decline to reinstate the application.

**Conclusion.** On the basis of the information before us, we find no reason to overturn the staff's July 22, 2008, dismissal of application File No. BMPED-20071228ABS. Mercer Island School District #400's Petition for Reconsideration IS DENIED.

Sincerely,



Peter H. Doyle  
Chief, Audio Division  
Media Bureau

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<sup>28</sup> *Open Media Corporation*, Memorandum Opinion and Order, 8 FCC Rcd 4070, 4071 (1993).