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Spirit Radio of North Florida, Inc.
500 NE 16th Avenue
Gainesville, FL 32601

Re: WWLC(FM), Cross City, FL
Facility ID No. 121772
Spirit Radio of North Florida, Inc.
("Spirit")
File No. BMPED-20110623AAW

Dear Applicant:

This letter refers to the above-captioned application, as last amended on September 26, 2011,¹ to modify the antenna height, directional antenna pattern, and transmitter site. Spirit's proposal also requests waiver of the signal contour overlap protection provisions of 47 C.F.R. Section 73.509. For the reasons stated below, we deny Spirit's waiver request and dismiss its application.

Waiver Request

An engineering study of the application reveals that Spirit's proposed facilities would result in prohibited contour overlap with third adjacent channel licensed facility (BLED-19811007AJ) for WUFT-FM, Gainesville, FL, in violation of Section 73.509. Specifically, Spirit's interfering contour (100 dBu) causes prohibited overlap to the protected contour (60 dBu) of WUFT. Spirit recognizes this violation and requests waiver of Section 73.509.

In support of its waiver request, Spirit states that its proposal will increase WWLC's service area by 122% (to 846 square kilometers), and population by 196% (to 32,920 people). Spirit further states that WWLC would cause third adjacent channel signal overlap to an area of 64 square kilometers, which is approximately 0.45% of WUFT's 60 dBu contour service area. In addition, Spirit claims that WWLC will not cause interference to listeners because the area is unpopulated and expected to remain uninhabitable. Spirit submits multiple letters from Ecosystem Research Corporation, and the Levy County Development Department, which conclude that the general topography is not conducive for residential use and poses significant impediments to potential development for such use in the future. However, Spirit noted, in the unlikely event of any future development within the 100 dBu contour area, Spirit has received a letter of consent from WUFT-FM to accept any potential interference caused by WWLC to WUFT-FM. Thus, Spirit believes that the waiver request is warranted in this instance.

Discussion

We disagree. While the area of overlap currently may be undeveloped, lack of population alone is not sufficient to waive this core interference protection requirement. Furthermore, the existence of a state highway indicates the possibility of at least temporary listeners in the area. Also, while Spirit contends that Florida land use consultants and authorities are conclusive in their assessment that development is

¹ Spirit also informally supplemented its waiver request on February 29, 2012.

unlikely, it can not be definitively concluded that residential establishments will not ever exist in that area in the future. In any event, Section 73.509 specifically addresses overlap area rather than the population in the overlap area. Moreover, Spirit fails to cite any published decisions granting a waiver under similar circumstances to its request.

While requests for waivers of second- and third-adjacent channel overlap for new stations are individually appealing due to the relatively large area and population served as compared to the small area (and in this case, no population) receiving prohibited contour overlap, they lose this appeal when considered against the Commission's allocations scheme for noncommercial FM stations. Allowing applicants to create new prohibited contour overlap effectively nullifies the protection mandated by Section 73.509 to noncommercial educational FM station's 60 dBu protected service areas. In particular, the affected station would lose service area and potential population to be served without receiving any benefit in return.² This interference interrupts the continuity of existing service provided by WUFT-FM throughout its protected service area, and thus diminishing the quality of FM service provided by the afflicted station.³ Over time, the grant of numerous similar waivers would degrade the quality of existing FM reception from stations throughout the entire noncommercial educational FM band. As the Commission stated in *Open Media Corp.*, 8 FCC Rcd at 4070, 4071:

It is the overall scheme of [noncommercial educational FM] allocations which is paramount, and when faced with a choice between a larger service area with overlap received on one hand, and lesser coverage with no prohibited overlap on the other, the Commission favors the latter. See *Educational Information Corporation*, 6 FCC Rcd 2207, 2208 (1991).

The fact that WUFT-FM has agreed to receive the prohibited contour overlap does not warrant waiver of the rule. Section 307(b) of the Communications Act of 1934, as amended ("the Act"),⁴ mandates that the "Commission shall make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution to each of the same." Implicit in this statement is the fact that it remains the function of the Commission, not applicants or licensees, to establish definitions of protected service and to ensure that existing protected service is not degraded by interference. The Commission has stated that the public interest is not served by allowing applicants and licensees to negotiate among themselves which areas may receive interference. See *Open Media Corp.*, 8 FCC Rcd 4070 (1993). Therefore, since we cannot find that the public interest is served by this proposal, the consent of WUFT-FM is of limited utility.

In view of the limited interference potential between third-adjacent channel noncommercial educational FM stations, the Commission has granted waivers of Section 73.509 where noncommercial educational stations sought to increase the 60 dBu service contour so as to overlap the interfering contour of another noncommercial educational station and thereby receive overlap. See *Educational Information Corp.*, 6 FCC Rcd 2207 (1991). Here, WWLC proposes to cause prohibited overlap and create new interference. Therefore, the requested waiver of Section 73.509 does not fall within that precedent. Accordingly, the applicant's request for waiver of 47 C.F.R. Section 73.509 will be denied.

² Contrast this with the situation of WCPE, Raleigh, NC in *Educational Information Corp.*, 6 FCC Rcd 2207 (1991), wherein licensed FM station WCPE agreed to accept a small amount of interference received in exchange for a large increase in its 60 dBu service area.

³ This has been called the "swiss cheese" effect, where a station's protected service contour is punctured by "holes" of interference from multiple second- and third-adjacent channel FM stations. *Revision of FM Rules (Notice of Proposed Rulemaking)*, 21 RR 1655, 1674 (1961).

⁴ 47 U.S.C. § 307(b).

Conclusion

The Commission's rules may be waived only for good cause shown.⁵ An applicant seeking a rule waiver has the burden to plead with particularity the facts and circumstances that warrant such action.⁶ The Commission must give waiver requests "a hard look," but an applicant for waiver "faces a high hurdle even at the starting gate"⁷ and must support its waiver request with a compelling showing.⁸ The Commission may exercise its discretion to waive a rule where the particular facts make strict compliance inconsistent with the public interest.⁹ In addition, the Commission may take into account considerations of hardship, equity, or more effective implementation of overall policy on an individual basis.¹⁰ However, waiver of the Commission's rules is appropriate only if both (i) special circumstances warrant a deviation from the general rule, and (ii) such deviation will serve the public interest.¹¹ Spirit's request fails to present good cause for waiver of Section 73.509. Spirit has not shown sufficiently unique "special" circumstances, *i.e.*, rare and exceptional circumstances beyond its control to justify a waiver of Section 73.509. Finally, we find that the facts and circumstances set forth in the justification are insufficient to establish that granting waiver of Section 73.509 would be in the public interest.

In light of the above, Spirit Radio's request for waiver of Section 73.509 IS HEREBY DENIED and its application BMPED-20110623AAW IS HEREBY DISMISSED as unacceptable for filing. This action is taken pursuant to Section 0.283 of the Commissions Rules.¹²

Sincerely,



Rodolfo F. Bonacci
Assistant Chief
Audio Division
Media Bureau

cc: Aaron P. Shainis

⁵ 47 C.F.R. § 1.3.

⁶ See *Columbia Communications Corp. v. FCC*, 832 F.2d 189, 192 (D.C. Cir. 1987) (citing *Rio Grande Family Radio Fellowship, Inc. v. FCC*, 406 F.2d 644, 666 (D.C. Cir. 1968)).

⁷ See *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969), *aff'd*, 459 F.2d 1203 (1972), *cert. denied*, 93 S.Ct. 461 (1972) ("*WAIT Radio*"). See also *Thomas Radio v. FCC*, 716 F.2d 921, 924 (D.C. Cir. 1983).

⁸ *Greater Media Radio Co., Inc.*, Memorandum Opinion and Order, 15 FCC Rcd 7090 (1999) (citing *Stoner Broadcasting System, Inc.*, Memorandum Opinion and Order, 49 FCC 2d 1011, 1012 (1974)).

⁹ *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) ("*Northeast Cellular*").

¹⁰ *WAIT Radio*, 418 F.2d at 1159; *Northeast Cellular*, 897 F.2d at 1166.

¹¹ *Network IP, LLC v. FCC*, 548 F.3d 116, 125-128 (D.C. Cir. 2008) ("*Network IP*"); *Northeast Cellular*, 897 F.2d at 1166.

¹² 47 C.F.R. § 0.283.