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

FCC 96-20

In re: Application of	)	
	)	
Board of Education of the City of Atlanta	)	File No. BPH-860530IB
	)	
	)	
For a Construction Permit to modify the facilities of FM Station WABE(FM) Atlanta, Georgia	)	

MEMORANDUM OPINION AND ORDER

Adopted: January 25, 1996 **Released:** July 2, 1996

By the Commission:

1. The Commission has before it an Application for Review filed on December 30, 1991, by the Board of Education for the City of Atlanta, licensee of noncommercial educational station WABE(FM) ("WABE"). WABE seeks reexamination of the November 20, 1991, action by the Mass Media Bureau ("Bureau") denying reconsideration of the dismissal of the above-captioned application to modify WABE's facilities. For the reasons set forth below, we dismiss the Application for Review.

2. Background. Prior to 1983, WABE was licensed to operate with facilities of 30 kilowatts effective radiated power ("ERP") at 410 meters antenna height above average terrain ("HAAT") from a site in Atlanta. In 1983, ostensibly to provide new service to a substantial area outside Atlanta, the station relocated to its current site on Stone Mountain and increased its facilities to 96 kW at 296 meters HAAT. The station also installed a directional antenna. Subsequently, in order to improve coverage of Atlanta while maintaining coverage of the populous outlying areas, WABE filed the subject application. In this application, WABE proposed to increase its facilities to 100 kW at 311 meters HAAT and to relocate the WABE antenna from Stone Mountain to a site in Atlanta owned by the Board of Education of the City of Atlanta. The application did not comply with the interference protection standard for co-channel licensed noncommercial educational station WEPR(FM), Greenville, South Carolina, in that the proposed WABE 40 dBu interfering contour would overlap with WEPR's protected contour in violation of 47 C.F.R. §73.509. WABE accordingly requested a waiver of that rule. In support of the waiver, WABE noted that its proposal would provide improved service to Atlanta from a more centralized tower and would permit the station to achieve operating economies by use of an existing tower. WABE also submitted a copy of a November 6, 1985 agreement with WEPR(FM) which, WABE claimed,

supported the mutual increase of both WABE and WEPR to 100 kW, as well as an engineering analysis purporting to calculate the objectionable interference caused to and received from WEPR(FM). However, WABE's engineering analysis used the Commission's former interference standards, the "desired to undesired" signal strength ratios, rather than the contour overlap standards in effect at the time WABE filed its application to modify its facilities. Those standards are set forth in 47 C.F.R. § 73.509.[1]

3. The Bureau denied the request for waiver and dismissed the application, holding that: (i) the use of the undesired-to-desired signal strength ratio method was inappropriate, as Section 73.509 requires compliance with a contour overlap standard, not an interference ratio criterion; and (ii) WABE had not demonstrated that circumstances warranted a waiver of Section 73.509 to permit the predicted overlap. The staff also held that an agreement to accept interference did not constitute sufficient justification for waiver of the rule. Letter to the Board of Education of the City of Atlanta, reference 8920-MLR (Chief, FM Branch, October 20, 1986).

4. WABE filed a petition for reconsideration of that action, which the Bureau denied. The Bureau's calculations under the overlap method prescribed in Section 73.509 indicated that the prohibited overlap would amount to 10.8% of WEPR's service area (1,945 square kilometers) and 12.5% of WABE's proposed service area (2,122 square kilometers). The Bureau noted that while it

> [supported] WABE's desire to overcome its reception problems, [it could not] accept [a] method where the solution is accomplished at the expense of another station's service . . . to persons within [that station's] 1 mV/m contour.

Id. at 5.

5. WABE's application for review, which was filed one day late,[2] argues that the public

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[1] The method of calculating interference was changed from the use of "undesired-to-desired" signal strength ratios to a "contour overlap" standard in Memorandum Opinion and Order in MM Docket No. 20735, 50 Fed.Reg. 27, 954 (July 9, 1985). The signal strength ratio method serves to identify the area in which the quality of service is predicted to fall below the minimally acceptable level. The contour overlap method identifies not only the area in which quality of service falls below the minimally acceptable level but also the larger area in which the quality of service is predicted to be better than minimally acceptable overall but nonetheless may be diminished for some listeners.

[2] Public Notice announcing the denial of the petition for reconsideration was issued on November 25, 1991. By WABE's own calculations, the appeal was due on December 26, 1991. However, due to a clerical omission by WABE, it was not filed until December 27.

interest warrants acceptance of its late-filed pleading and grant of the waiver request rejected by the Bureau. Specifically, WABE argues for the first time that the WEPR signal which the Bureau sought to protect is not in actuality receivable in the subject area. According to WABE, while the Bureau's opinion hinges on the alleged diminution of the quality of WEPR's signal by WABE's proposal, "[t]he truth of the matter, most recently confirmed by the licensee of station WEPR ... is that 'because of existing interference environment and/or terrain considerations, Station WEPR already cannot be heard reliably in the area in which interference is predicted.'" Application at 3, quoting a letter to WABE's general manager from William D. Hay, Vice-President for Radio of WEPR's licensee, South Carolina Educational Television Commission, dated December 23, 1991.[3] WABE concludes that its proposal should be favorably considered because it will enhance service to Atlanta without any actual harm.

DISCUSSION

6. WABE has failed to comply with the procedural requirements of 47 C.F.R. §1.115. WABE filed its application for review one day late without demonstrating why it could not file in a timely manner or presenting a basis for waiver of the time constraints of Section 1.115. WABE asserts "clerical omission" and alleges that public notice of the denial of reconsideration was listed improperly in the "Broadcast Applications" section of Report No. 1536 rather than the "Broadcast Actions" section, and claims that therefore public notice of the action "had not been effectively issued." Conditional Motion for Acceptance of Late-filed Pleading, at 2. However, actions on petitions for reconsideration are consistently listed in the "Applications" portion of Commission public notice reports. Additionally, WABE does not indicate that it was in any way prejudiced by that listing. Accordingly, WABE's

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[3] WABE offers to submit additional "technical documentation" or field tests to support its waiver request. However, field strength measurements can vary over time and are subject to changing environmental conditions. Thus, generally they are not a reliable means of locating a particular protected or interfering contour. See Field Strength Curves, 53 FCC 2d 866, 867-70 (1975). Accordingly, such measurements, as a general matter, have limited utility in analyzing specific waiver requests. See 47 C.F.R. § 73.314(a) (limiting field strength measurement submissions to rulemaking proceedings concerning general technical standards). Cf. Golden West Broadcasters, 11 FCC Rcd 3377 (1995) (recognizing rule restriction on alternative measurement data but accepting such data where extreme topography makes standard prediction coverage methodology unreliable and other unique factors are present). Although this rule bars acceptance of WABE's technical documentation proffer, we are bound to consider carefully all waiver requests. WAIT Radio v. FCC, 418 F.2d 1135, 1159 (D.C. Cir. 1969), cert. denied, 409 U.S. 1027 (1972). A waiver showing must be factually grounded, particularized and clear. WAIT Radio, 418 F.2d at 1156-57. Plainly, WABE's mere offer to submit technical studies falls far short of this judicially-set standard. In any event, our rules do not permit WABE to submit such information at this point in the proceeding. See 47 C.F.R. § 1.115(c).

request for acceptance will be denied and its application for review will be dismissed as procedurally defective. See Warren Price Communications, 6 FCC Rcd 4424 (1991); Western Connecticut Broadcasting Co., 59 FCC 2d 1249, 1251 (1976). Nonetheless, we believe it important to comment on WABE's primary argument that "because of [the] existing interference environment and/or terrain considerations," WEPR cannot be heard reliably in the area in which interference is predicted. This conclusion, as supported by the letter from William D. Hay, warrants waiver of Section 73.509 in WABE's view.

7. We note initially that WABE's term "interference environment" is vague and undefined and that WABE failed to specify what standards were used in its determination that WEPR's service is "unreliable" in relevant areas. Under the Commission's rules, WEPR's present 60 dBu contour receives no prohibited contour overlap, and hence no interference as defined by Section 73.509, from any other FM station, including WABE. In any event, WABE's and Mr. Hay's statements that WEPR cannot currently be received reliably in the area predicted to receive interference if the proposed modification is granted are of limited utility. Propagation of FM signals is statistical in nature, and uniform service does not occur throughout a station's protected service contour, especially toward the edges of a station's service area. In general, along a station's 60 dBu F(50,50) protected service contour, only 50% of the locations will receive a 60 dBu (or greater) signal 50% of the time. The propagation curves in 47 CFR § 73.333 (to which § 73.509 refers) were prepared from data compiled over many years and incorporate numerous environmental and terrain conditions. Therefore, our use of these propagation curves in defining a 60 dBu service contour takes into account that there will be locations within that contour which will receive less than a 60 dBu signal at least part of the time. [4] Adding an interfering signal to this area will clearly diminish the probability of satisfactory reception in this area.

8. WABE has apparently decided that whatever reception of WEPR may be possible by people living in the proposed interference area may be disregarded if WABE and WEPR so agree. We cannot accept this conclusion. The Commission has consistently prohibited applicants and licensees from negotiating among themselves which areas may receive interference. See Open Media Corporation, 8 FCC Rcd 4070 (1993). This prohibition is grounded in the requirements of Section 307(b) of the Communications Act, 47 U.S.C. §307(b). Under that provision, the Commission must ensure the "fair, efficient, and equitable distribution of radio service" throughout the country. We are convinced that permitting negotiated interference agreements could thwart the "fair" and "equitable" distribution of service because licensees might see an advantage in compromising service to small communities and rural areas if, in exchange for that compromise, they could improve their coverage of more heavily populated urban areas. As noted in Pasadena Broadcasting Co. v. FCC, 555 F.2d 1046, 1050 (D.C.Cir. 1977), this possibility that service might become very concentrated in urban areas while less populated areas remain unserved or

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[4]Likewise, locations outside the 60 dBu contour will receive a 60 dBu or better signal part of the time.

underserved is "precisely the result Congress meant to forestall by means of Section 307(b).

9. We also believe that permitting negotiated interference agreements would undermine the statute's mandate to ensure "efficient" use of the spectrum. The Commission's technical requirements respond to that mandate by protecting licensed facilities from impermissible interference within their service areas. The protection of any given licensed facility, however, by necessity limits construction or modification of other nearby facilities. Underlying the technical requirements and this attendant "preclusionary" effect is the basic premise that licensed facilities will provide adequate service throughout their protected service area. Permitting licensees themselves to determine when circumstances warrant modifying a protected service area permits withdrawal of that station's service from the public without altering the preclusionary effect that the facility has on other facilities.[5]

10. Thus, as to the instant case, we conclude that, even if WABE's Application for Review had been timely filed, it would have been denied notwithstanding WABE's submission of an engineering analysis it claims supports waiver of Section 73.509 and notwithstanding its negotiated agreement with WEPR concerning interference.

11. Accordingly, pursuant to 47 C.F.R. §1.115(g), the Conditional Motion for Acceptance of Late-Filed Pleading filed by the Board of Education of the City of Atlanta IS DENIED and the attendant Application for Review IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

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[5]If two parties reach agreement and submit a proposal which would cause interference, they may request a waiver of Section 73.509. The Commission will then examine all the facts and circumstances presented and determine whether or not the public interest would be served by grant of the waiver.