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August 3, 2009

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VIA HAND DELIVERY

Marlene H. Dortch, Esq., Secretary
Federal Communications Commission
236 Massachusetts Ave., NE, Suite 110
Washington, DC 20002

***ATTN: Chief, Audio Division,
Media Bureau***

Re: *Reply of Urban Radio I, LLC to Drew University*
Application to Modify WMNJ(FM), Madison, NJ (FIN 17592)
File No. BPED-20070907ADP

Dear Ms. Dortch:

Transmitted herewith, on behalf of Urban Radio I, LLC, the licensee of WBLN(FM), New York, New York, are an original and four (4) copies of its *Reply of Urban Radio I, LLC* filed in response to Drew University's Response in the matter concerning the above-referenced application.

In addition, an extra copy of the response is enclosed. Please date-stamp the extra copy and return it to the courier.

Should you have any questions concerning this matter, please contact the undersigned.

Respectfully submitted,

HOLLAND & KNIGHT LLP



Leighton T. Brown
Counsel for Urban Radio I, LLC

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**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

FILED/ACCEPTED

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Federal Communications Commission
Office of the Secretary

In re the Application of)
)
DREW UNIVERSITY)
)
To Modify the Facilities of Noncommercial)
Educational Class D Station WMNJ(FM),)
Madison, New Jersey (Facility ID 17592))

File No. BPED-20070907ADP

REPLY OF URBAN RADIO I, LLC

Urban Radio I, LLC, the licensee of WBL5(FM), New York, New York ("Urban Radio"), by its attorneys, hereby submits its Reply to the "Consolidated Response of Drew University," filed on July 9, 2009 (the "Response"). On May 11, 2009, Urban Radio filed an Objection to the above-captioned application of Drew University to modify the facilities of WMNJ(FM), Madison, New Jersey (the "Application") and a Protest to the Letter¹ in which the Media Bureau (the "Bureau") directed Urban Radio to Show Cause why the Commission should not modify the license of WBL5 in order grant the Application, permit WMNJ to change its channel of operation from 205D to 300D, which is a second-adjacent channel to WBL5, cause prohibited interference to WBL5, and waive the relevant Commission rules and procedures in order to permit that interference.

As demonstrated in Urban Radio's Objection, authorization of new interference to WBL5 is entirely unjustified as a matter of sound public policy and the facts placed on record by Drew University are incorrect. Even if, contrary to the operative Commission rule, the Bureau is inclined to waive its rules to accommodate the operations of WMNJ, it should not allow WMNJ

¹ Letter of Peter H. Doyle, Chief, Audio Division, Media Bureau, Reference No. 1800B3-MFW (Apr. 2, 2009).

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to operate on Channel 300D because it is undisputed that there are thirteen other channels on which WMNJ's operation would cause significantly less interference than on Channel 300D. In its Response, Drew University did not even attempt to refute Urban Radio's showing that operating WMNJ on one of these thirteen other channels would cause significantly less interference than what would be caused by its operations on Channel 300D.

Drew University also failed to demonstrate any facts and circumstances unique to it that justify a waiver. Instead, Drew University simply objects to the interference standard expressly stated in the Commission's rule, a quarrel that any Class D licensee might have but is not unique to WMNJ. Such an objection may only be addressed properly in a Petition for Rulemaking because the Bureau does not have the authority to overturn a Commission rule.

Finally, Drew University bases its request on the value of its program service as compared to WBLs. That raises questions of fact that only could be resolved in a hearing.

I. Drew University Did Not Refute Urban Radio's Demonstration That Many Other FM Channels Would Cause Less Interference.

In its Objection, Urban Radio proved that there are thirteen alternate channels which would be better suited for WMNJ than its proposed Channel 300D. Urban Radio's consulting engineers stated:

As set forth on Table C, of the 48 candidate channels, there are thirteen alternate channels which would be better suited for WMNJ than its proposed Channel 300D. The exact technical facility proposed in the pending WMNJ application on Channel 224, 228, 232, 236, 240, 244, 248, 264, 272, 276, 280, 284 or 291 would be compliant with the FCC's cochannel and first-adjacent channel protection requirements. In addition, on any of these thirteen alternate channels WMNJ would cause less second or third adjacent channel interference to any other station in the radio market in comparison to the interference that would be caused to WBLs on a second or third adjacent channel basis.²

² Objection, Statement of William J. Getz, p. 6 (footnotes omitted).

Drew University made no attempt to refute this evidence that there are thirteen channels more suited to its proposed operation than Channel 300D. Thus, Drew University concedes, as it must, that it has ignored thirteen channels on which its proposed operation would cause less second- or third-adjacent channel interference than on Channel 300D.

Drew University's only reference to Urban Radio's decisive engineering analysis is its contention that there is no channel to which WMNJ could move which would not cause "some level" of interference.³ While correct, Drew University misses the point, which is that it fails to mitigate the harm of interference, and thus cannot survive under the public interest standard.

II. Drew University Continues to Use an Improper Interference Standard.

In its Response, Drew University contends that the Commission committed an "apparent error" when it implemented a rule applying the -20 dB D/U interference standard to Class D radio stations, rather than -40 dB D/U standard, which the Commission applies to low power FM ("LPFM") stations.⁴ Drew University is wrong. In the applicable Report and Order, the Commission explicitly addressed Class D stations and intentionally declined to adopt any rule revisions with respect to that service.⁵ Applying these different interference standards was a deliberate decision. It is in black and white that Section 73.509 requires -20 dB as the second-adjacent channel D/U ratio to define the WMNJ interfering contour. As a consequence, the Commission need not reconsider its policy simply because Drew University seeks a waiver.⁶

³ See Response, p. 1.

⁴ Response, p. 4.

⁵ *1998 Biennial Regulatory Review – Streamlining of Radio Technical Rules in Parts 73 and 74 of the Commission's Rules*, Second Report and Order, 15 FCC Rcd 21649, 21671 (2000).

⁶ See *WAIT Radio v. FCC*, 897 F.2d 1164 (D.C. Cir. 1969) ("A general rule implies that a commission need not re-study the entire problem de novo and reconsider policy every time it receives an application for waiver of the rule.").

Commission rules⁷ and precedent make clear that Class D stations consistently are regulated differently than other FM stations. For instance, in 1978, the Commission required that Class D stations either increase power to at least the Class A minimum of 100 watts or change channels.⁸ The Commission adopted these rule changes, and required that 10-watt operations protect all stations from interference, because of its “concern about the impact of future grants of low power station authorizations.”⁹ After it balanced the competing equities, the Commission found that it had “become clear that these low power operations cannot be permitted to function in a manner which defeats the opportunity for other more efficient operations which could serve larger areas . . .”¹⁰ This clearly demonstrates that Class D stations are classified as a different service than LPFM stations, and thus, need not be treated the same.¹¹ And it makes the more stringent interfering contour clearly rational. The Commission deliberately decided to protect LPFM stations more than Class D stations, thus the intention to apply different interference criteria between these classes of stations. Further, the Commission often applies technical rules differently based on the service being regulated.¹²

⁷ See, e.g., 47 C.F.R. 73.512 (“Special procedures applicable to Class D noncommercial educational stations.”).

⁸ *Changes in the Rules Relating to Noncommercial Educational FM Broadcast Stations*, Second Report and Order, 69 FCC 2d 240 (1978) (“1978 Order”).

⁹ *Id.*

¹⁰ *Id.*

¹¹ See also *Educational FM Broadcast Channels*, Notice of Inquiry, 31 Fed. Reg. 14755, 14756 (1966) (“[10-watt] stations present certain problems. Operation with such limited power does not usually represent an efficient use of scarce spectrum space, since coverage is often limited to a few miles . . . In our view, therefore, the time may well be at hand when proper use of the increasingly crowded educational FM band requires restrictions on the further authorization and continuance of 10-watt operations . . .”).

¹² See, e.g., 47 C.F.R. Part 73, subpart A (AM engineering), subpart B (FM engineering), and 47 C.F.R. § 73.1570 (specifying different modulation levels for different services).

III. Drew University Has Failed to Make the Requisite Showing for a Waiver.

Drew University has failed to provide sufficient justification for the grant of its waiver request. “A waiver is appropriate only if special circumstances warrant a deviation from the general rule and such deviation will serve the public interest.”¹³ No special circumstances exist.

As demonstrated in the preceding section, the Commission deliberately chose to apply the -20 dB D/U ratio to Class D stations. Drew University’s complaints about that standard therefore are not “special;” they express a concern applicable to every Class D station. The “circumstances” of WMNJ are identical to all other stations in its class of service, including facing the possibility of loss of service due to its secondary status and the interference standard which Section 73.509 requires it to observe—an outcome that the Commission contemplated.¹⁴

As a policy matter, the Commission has held repeatedly that any increase in total interference is not in the public interest.¹⁵ In fact, the Bureau has noted “that the Commission has held that it will not countenance new overlap caused where . . . none existed previously.”¹⁶ Drew University thus failed to make either of the requisite showings to justify a waiver of Section 73.509 of the Commission’s rules.

Drew University continues to urge an unjustified interpretation of Section 73.509 because an engineering analysis based upon the provisions of that rule establishes that a grant of the Application would cause new interference to 4,260 persons;¹⁷ not zero as Drew University wishes. In reality, Drew University has requested a repeal of the Section 73.509 interference

¹³ *Northwest Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (citing *WAIT Radio*, 418 F.2d at 1157) (emphasis added).

¹⁴ *1978 Order*, 69 FCC 2d 240.

¹⁵ See, e.g., *Centenary College*, Letter Decision, 23 FCC Rcd 17317 (Audio Div., Dec. 2, 2008); *Grandfather Short-Spaced FM Stations*, Report and Order, 12 FCC Rcd 763 (2005).

¹⁶ *Centenary College*, 23 FCC Rcd 17317 (citing *Educational Info. Corp.*, Memorandum Opinion and Order, 12 FCC Rcd 6917, 6918-19 (1997)).

¹⁷ Objection, p. 2-3; Statement of William J. Getz, p. 3.

criteria as applied to Class D stations. If the Application is granted, every Class D licensee could seek the same “waiver” of Section 73.509 for the same reasons. If the Bureau waives the explicit mandates of Section 73.509 as they apply to Class D stations, such an action would have far-reaching consequences and undermine the Commission’s established licensing scheme.¹⁸ Drew University’s contention, if accepted, would “eviscerate the rule, viz., establishing that a Section 73.509 waiver is warranted in circumstances where spectrum congestion prevents the licensing of a rule-compliant station proposal.”¹⁹

As noted above, by refusing to propose any of the thirteen channels that Urban Radio has demonstrated would cause less impermissible interference, Drew University has not sought to mitigate interference harm. Similarly, Drew University apparently refuses to consider a reduction of its operating power in order to find an interference-free channel. Nowhere has it claimed that a simple reduction in power would not allow it to move to another channel without the need for a waiver of Commission rules or cause less interference. Without proof that reduced power would not mitigate the circumstance in which Drew University finds itself, it cannot reasonably contend that a denial of its waiver request would force it to cease operations.²⁰

Finally, in the 1978 Order noted above, the Commission recognized that the commercial FM band may not be able to accommodate some of the Class D stations being forced to change channels. In this situation, the Commission permitted such a Class D station to seek use of

¹⁸ See, e.g., *Spirit Radio of North Florida, Inc.*, Letter Decision, 24 FCC Rcd 2958 (Audio Div., Mar. 6 2009) (“[R]outine waivers of Section 73.509 . . . would undermine the Commission’s well-settled NCE-FM licensing scheme.”); *Centenary College*, 23 FCC Rcd 17317 (“[I]t is the Commission’s responsibility to establish and enforce signal protection requirements and to ensure that existing protected service does not suffer interference.”).

¹⁹ *Spirit Radio*, 24 FCC Rcd 2958.

²⁰ See *Educational Info. Corp.*, 6 FCC Rcd 2207 at 2008 (“[W]hen faced with a choice between increased coverage with increased interference received on one hand, and lesser but adequate coverage without prohibited interference on the other, the Commission favors the latter.”).

Channel 200 or, if that was not possible, to “determine which channel in the reserved noncommercial portion of the FM band poses the least preclusionary impact on other potential stations . . .”²¹ Clearly, the Commission preferred an infringement upon reserved band channels rather than allowing new interference to be caused to a full-power commercial FM station in the non-reserved channels. Therefore, Drew University should seek to move WMNJ’s operations to the reserved band before requesting permission to cause impermissible interference to WBLS. In fact, because of the secondary status of Class D stations, “it is possible that future changes in the FM Table could require the termination of an operation that had moved to a commercial channel . . .”²² Thus, the Commission intended that Class D stations shut down if they could not comply with interference mandates. Drew University’s attempt to waive the relevant interference criteria is directly contrary to the Commission’s stated intention.

IV. Drew University’s Request Requires a Rulemaking Proceeding, Not Simply a Waiver, and Cannot be Granted by the Bureau.

As previously noted by Urban Radio, the Bureau lacks legal authority to grant the waiver sought by Drew University because this is a case of first impression and a wholesale re-write of the rule. The Bureau has not been delegated authority from the Commission to revise interference criteria, to apply LPFM application processing standards to Class D licensees or, in effect, repeal the interference standard applicable to all Class D stations.²³ In addition, because Drew University failed to demonstrate that the circumstances here are unique, the only avenue by which it could reasonably pursue its claims is through a Petition for Rulemaking.

²¹ *1978 Order*, 69 FCC 2d 240.

²² *Id.*

²³ *See WAIT Radio*, 897 F.2d 1164 (“The agency may not act out of unbridled discretion or whim in granting waivers any more than in any other aspect of its regulatory function.”).

V. Even if a Waiver Were Permissible, Questions of Fact Would Require a Hearing.

Even if the Bureau somehow finds that it has the power to grant a waiver (or repeal) of the kind requested by Drew University, the resolution of this matter involves the determination of at least two questions of fact, which cannot be addressed in other than a hearing setting. First, a factual question exists as to the population affected by the interference to WBLS's operations. Drew University, through its own misguided interpretation of Section 73.509, asserts that there would only be a 100-meter interference area, affecting no population. On the other hand, Urban Radio has provided sound engineering, based on the Commission's definition of second-adjacent channel Class D interference rather than creative fiction, that grant of the Application would cause an impermissible interference contour with a 994 meter radius that would affect 4,260 persons. That is a direct question of fact that cannot be decided on the paper record if the Bureau bows to Drew University's requests.

Second, the Bureau cannot decide the merits of the stations' programming and public interest benefits. Drew University contends that, if the waiver is not granted, its "minority and women students will not only lose a local radio source, they will lose the opportunity to participate in the Station's operations."²⁴ Urban Radio has proven that 4,260 persons would lose WBLS, a local service provided by a radio station owned and operated by African Americans. Questions of fact about the value and prevalence of two different radio services are questions of fact that would have to be adduced in a hearing.²⁵

Moreover, not only is it a question of fact as to which service would provide greater public interest benefits to the listeners in the area of interference, the Bureau cannot waive a rule

²⁴ Response at p. 6.

²⁵ See 47 U.S.C. §316(b); 47 U.S.C. §309(3); 47 C.F.R. § 1.87(e); *Ashbacker Radio Co. v FCC*, 32 U.S. 327 (1945).

designed to protect a service such as WBLS from harmful interference based upon the programming or other public interest benefits provided by the continued operations of WMNJ,²⁶ especially without a record that establishes the relevant public interest benefits offered by both stations. Such a record would require a hearing.

VI. Conclusion

Drew University did not even attempt to refute Urban Radio's demonstration that its use of any one of thirteen alternate channels would cause significantly less interference than what would be caused by operating WMNJ on Channel 300D. Drew University also failed to demonstrate any facts and circumstances unique to it which might justify a waiver.

Instead, Drew University simply hopes to repeal the interference standard applicable to all Class D stations. The grant of its waiver request would exceed Bureau authority by rewriting the operative rule, contrary to the explicit intentions and licensing scheme established by the Commission. Such a decision would create an arbitrary and unsupportable precedent that would eliminate the required interference criteria for all Class D stations. Therefore, the Application should be dismissed and the Show Cause order decided in favor of Urban Radio.

²⁶ See *Lakeside Telecommunications, Inc.*, Memorandum Opinion and Order, 20 FCC Rcd 763, 765 (2005) ("It is also well established that the Commission will not, absent extraordinary circumstances, waive core technical rules based upon ownership or programming considerations.").

Respectfully submitted,

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August 3, 2009

Its Attorneys

CERTIFICATE OF SERVICE

I, Judy Norris, a legal secretary with the law firm of Holland & Knight LLP, hereby certify that on the 3rd day of August 2009, a copy of the foregoing Reply of Urban Radio I, LLC to the Consolidated Response of Drew University, was hand delivered (where indicated) and deposited in the U.S. mail, postage prepaid, addressed to:

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