

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

In the Matter of)
)
California State University, Long Beach) File No. BPED-20070905ABF
Foundation) Facility ID No. 8197
)
Application for a Construction Permit for a Minor)
Change to Station KKJZ(FM), Long Beach,)
California)

MEMORANDUM OPINION AND ORDER

Adopted: August 13, 2014

Released: August 14, 2014

By the Commission:

1. The Commission has before it a February 5, 2009, California State University, Long Beach Foundation ("CSULB") Application for Review. CSULB seeks review of the Bureau's December 31, 2008, letter decision denying reconsideration of the Bureau's December 17, 2007, letter which: (1) denied CSULB's request for waiver of Section 73.509 of the Commission's Rules ("Rules"); and (2) dismissed CSULB's application for a minor change to modify effective radiated power, antenna height, and location ("Application") of its Station KKJZ(FM), Long Beach, California ("Station"). For the reasons set forth below, we deny in part and dismiss in part the Application for Review.

2. CSULB's Application for Review reiterates its arguments below, viz., that: (1) the Reconsideration Decision erred in not granting CSULB's request for waiver of Section 73.509 of the

1 On February 20, 2009, Santa Monica Community College District ("SMCC") filed an Opposition, to which CSULB replied on March 5, 2009. SMCC is licensee of co-channel Station KCRY(FM), Mojave, California, the station with which KKJZ(FM), as proposed in the Application, would have prohibited contour overlap.

2 See California State University, Long Beach, Letter, Ref. 1800B3-TB (MB rel. Dec. 31, 2008) ("Reconsideration Decision").

3 47 C.F.R. § 73.509.

4 See California State University, Long Beach, Letter, Ref. 1800B3-TB (MB rel. Dec. 17, 2007) ("Staff Decision").

5 Concurrently with the filing of its Application for Review, CSULB submitted a "Petition for Resolution of Rulemaking" ("Rulemaking Petition"), seeking to resume activity in MB Docket No. 98-93 and to reverse the policy adopted in 1997 prohibiting use of supplemental contour prediction methodology for purposes of predicting interference. See Amendment of Parts 73 and 74 of the Commission's Rules to Permit Certain Minor Changes in Broadcast Facilities Without a Construction Permit, Report and Order, 12 FCC Rcd 12371, 12402 (1997) ("Minor Changes R&O"). In MB Docket No. 98-93, the Commission sought comment on but declined to adopt a proposed alternate FM signal propagation methodology to show compliance with contour protection requirements. See 1998 Biennial Regulatory Review -- Streamlining of Radio Technical Rules in Parts 73 and 74 of the Commission's Rules, Notice of Proposed Rule Making and Order, 13 FCC Rcd 14849, 14853-5463-65 (1998); Second Report and Order, 15 FCC Rcd 21649, 21651 (2000). Because the Rulemaking Petition is not part of this adjudicatory proceeding, it is not further considered here.

6 CSULB also argues for the first time that, in addition to its previously presented examples of the Commission's adoption of more sophisticated contour-prediction methodologies: (1) the full Commission has recognized the merit of "wider-ranging policy updates" when circumstances change, and the policy of relying on outdated interference (continued...)

Rules to accept the “more up-to-date and sophisticated” Longley-Rice signal propagation methodology to allegedly demonstrate lack of received interference from Station KCRY(FM);⁷ (2) the precedent relied on by the Bureau was nearly 12 years old and superseded in action taken by both Congress and the Commission that recognizes the sophistication of modern computer analyses;⁸ (3) the Commission does, in fact, accept supplemental showings in certain circumstances to demonstrate a station’s coverage, and it should do so here to determine whether received interference would occur;⁹ (4) the Bureau failed to fully evaluate the record before it and thus did not afford CSULB the “hard look” required by *WAIT Radio v. FCC*;¹⁰ and (5) the waiver request should be granted because the Station’s longstanding and unique mainstream jazz programming format needs to reach more listeners to remain economically viable.¹¹

3. Upon review of the Application for Review and the entire record, and finding no basis in the Application for Review to modify the *Reconsideration Decision*, we conclude that CSULB has failed to demonstrate that the Bureau erred. The *Reconsideration Decision* properly decided the matters raised consistent with Commission precedent,¹² and we uphold that decision. The Bureau has consistently declined to accept *ad hoc* supplemental showings to demonstrate compliance with contour protection requirements.¹³ Such showings make different assumptions about the effects of intervening terrain and other factors that can affect signal propagation, and thus, can generate widely differing results.¹⁴ We

(Continued from previous page) _____

prediction techniques in the NCE-FM service also should be re-examined, *see* Application for Review at 8, referencing changes in protection rights in the LPFM service in *Creation of a Low Power Radio Service*, 22 FCC Rcd 21912 (2007); and (2) where public interest goals are at stake, the Commission “almost universally gravitates toward more sophistication” in applying its interference rules, citing the Commission’s authorization of new operations by Qualcomm, Inc., notwithstanding the considerable amounts of interference caused to television stations and the Bureau’s allowance of digital television stations to agree among themselves to accept interference to facilitate the transition to digital broadcasting, *see id.* at 8-9, citing *Qualcomm, Inc.*, Letter, 22 FCC Rcd 14012 (MB/WTB 2007). Section 1.115(c) prohibits parties from raising new arguments on review. *See* 47 C.F.R. § 1.115(c). Accordingly, to the extent that it is based on these new arguments, we dismiss the Application for Review.

⁷ Application for Review at 5.

⁸ *Id.* at 6.

⁹ *Id.*

¹⁰ *Id.*; *see also WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969) (administrative waivers are a mechanism “to seek out the ‘public interest’ in particular, individualized cases.”) (subsequent history omitted).

¹¹ Application for Review at 9.

¹² *See Minor Changes R&O*, 12 FCC Rcd at 12402 (“[S]upplemental showings have not been accepted, nor will be accepted, for the purpose of demonstrating interference or prohibited contour overlap between FM broadcast stations.”).

¹³ *See Minor Changes R&O*, 12 FCC Rcd at 12402; *Puerto Rico Public Broadcasting Corp.*, Memorandum Opinion and Order, 29 FCC Rcd 4365 (2014) (“*Puerto Rico*”) (affirming staff refusal to consider supplemental showing as basis for Section 73.509 waiver); *Clear Creek Radio Inc.*, Memorandum Opinion and Order, 29 FCC Rcd 4367 (2014) (“*Clear Creek*”) (same).

¹⁴ *See, e.g., Evan D. Carb, Esq.*, Letter, 28 FCC Rcd 5667, 5670 (MB 2013) (supplemental analyses are more complex than standard contour prediction methods; underlying assumptions are often open to varying interpretations); *Ernest T. Sanchez, Esq., Susan M. Jenkins, Esq., Dennis J. Kelly, Esq.*, Letter, 26 FCC Rcd 12675, 12677-78 (MB 2011) (same); *Lauren Colby, Esq., Gregory Masters, Esq., and Daniel Huber, Esq.*, Letter, 23 FCC Rcd 9971, 9974 (MB 2008) (use of alternative propagation showing yielded anomalous results); *Ithaca Community Radio, Inc., c/o Donald E. Martin, Esq., and Mr. Darin Johnson*, Letter, 23 FCC Rcd 12910, 12912 (MB 2008) (supplemental showings not accepted because resolving propagation studies with differing results could significantly slow application processing); *Apogee Broadcasting Corporation*, Memorandum Opinion and Order, 100 FCC 2d 602, 604 (1985) (in low-power TV service, Commission refused to accept supplemental interference analyses based on terrain shielding because they were based on varying assumptions providing differing results).

conclude that the Bureau's decision to reject CSULB's alternate showing in the context of this application proceeding was appropriate.¹⁵ Moreover, the Bureau properly declined to consider CSULB's arguments concerning the popularity of the Station's programming format in considering its waiver request and we uphold that ruling for the reason stated in the decision.¹⁶

4. However, we take this opportunity to clarify and expand upon the Bureau's reasons for rejecting the waiver request based on the alternative propagation showing. Section 73.509 and Section 73.215(a) establish contour overlap prohibitions for FM non-reserved and reserved band licensing, respectively. The Commission has carved out several narrow exceptions to these longstanding protection requirements. In the NCE context, the Bureau has delegated authority to waive Section 73.509 in situations (1) involving second- and/or third-adjacent channel overlap (2) where the benefit of increased NCE service heavily outweighs the potential for interference in very small areas.¹⁷ The co-channel waiver proposed by CSULB, with more than 1.4 million persons residing in the 993 square kilometer overlap area that would result from a waiver, satisfies neither of these requirements. The Commission also has acknowledged that providing new service to underserved areas could provide a basis for a waiver.¹⁸ In this case, the proposed gain area, covering a portion of the nation's second largest and very spectrum congested radio market, is abundantly served. For stations in the non-reserved band, the Commission has stated that it would consider waivers of Section 73.215(a) to allow the use of a multiplexed transmitting antenna,¹⁹ to facilitate retention of existing service to an underserved area,²⁰ or where use of a directional antenna or reduced power at all feasible antenna sites would not avoid the creation of new prohibited overlap.²¹ None of these circumstances is present here.

5. Rather, CSULB grounds its waiver request on the fact that its supplemental showing generates different predicted interference results than the propagation methodology reflected in our rules. Thus, a grant of the requested waiver, unlike a waiver on the narrow grounds noted above, would open the door to waivers whenever there are "discrepancies" between the chosen alternate and standard methodologies. As an initial matter, we note that hundreds of stations operating in mountainous areas could make similar terrain-related showings and therefore that CSULB has failed to show the requisite "special circumstances" for waiver.²² More importantly, the Commission has previously identified the fundamental flaw in CSULB's reasoning:

To employ supplemental showings for FM stations in this manner would represent a fundamental change as to how contour protection applications are processed, and would

¹⁵ See *Clear Creek*, 29 FCC Rcd at 4369 (2014); *Puerto Rico*, 29 FCC Rcd 4365.

¹⁶ See *Open Media Corporation, Northern Illinois University, and Rockford Educational Broadcasting Foundation*, Memorandum Opinion and Order, 8 FCC Rcd 4070 ¶ 6 (1993) (Commission has well-established policy of refusing to grant waivers of technical rules based on non-technical considerations).

¹⁷ *Educational Information Corporation*, Memorandum Opinion and Order, 6 FCC Rcd 2207 ¶ 10 (1991).

¹⁸ See *Lakeside Telecommunications, Inc.* Memorandum Opinion and Order, 20 FCC Rcd 763 ¶ 5 (identifying underservice in gain area as a possible basis for a Section 73.509 waiver).

¹⁹ See *Greater Media Radio Company, Inc.*, Memorandum Opinion and Order, 15 FCC Rcd 7090, 7099 (1999) citing *Amendment of Part 73 of the Commission's Rules to Permit Short-Spaced FM Station Assignments by Using Directional Antennas*, Report and Order, 4 FCC Rcd 1681 (1989), *recon. granted in part and denied in part*, 6 FCC Rcd 5356, 5360 nn.26-27 (1991) ("*Reconsideration Order*").

²⁰ *Id.* at 7095 ¶ 11, citing *Reconsideration Order*, 6 FCC Rcd at 5360 n.27.

²¹ *R & S Media*, Memorandum Opinion and Order and Order to Show Cause, 19 FCC Rcd 6300, 6305 (MB 2004).

²² See *NetworkIP, LLC v. FCC*, 548 F.3d 116, 125-28 (D.C. Cir. 2008); *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990).

require a separate rulemaking proceeding to specify standards, methods and assumptions, and possibly revised definitions for protected service areas and interference²³

Much is at stake here. Grant of the proposed waiver could potentially lessen the protections that hundreds – perhaps thousands – of stations now enjoy under Sections 73.509 and 73.215(a). The fact that an alternate methodology generates different results does not demonstrate that it is a more appropriate standard or otherwise provide a sufficient reason to make fundamental changes in our FM station protection policies. Given the complex engineering considerations involved in crafting interference protection standards and the absence of an approved alternative propagation methodology for predicting FM interference, the arguments raised here would more appropriately be addressed in a notice and comment rulemaking proceeding.²⁴

6. Accordingly, IT IS ORDERED, that pursuant to Section 5(c)(5) of the Act, 47 U.S.C. § 5(c)(5), and Sections 1.115(c) and 1.115(g) of the Commission's rules, 47 C.F.R. §§ 1.115(c), 1.115(g), the Application for Review, filed on February 5, 2009, by California State University, Long Beach Foundation, IS DENIED IN PART AND DISMISSED IN PART.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

²³ *Minor Changes R&O*, 12 FCC Rcd at 12402.

²⁴ *See Clear Creek*, 29 FCC Rcd at 4367 ¶ 4.