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BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C. 20554

In re Application of )  
 )  
CALIFORNIA STATE UNIVERSITY, )  
LONG BEACH FOUNDATION )  
(Long Beach, California) )  
 )  
For Minor Change in Licensed Facilities )  
Of Station KKJZ(FM), Facility Id. 8197 )

File No. BPED-20070905ABF

FILED/ACCEPTED

FEB - 5 2009

To: The Commission

Federal Communications Commission  
Office of the Secretary

APPLICATION FOR REVIEW

1. California State University, Long Beach Foundation ("CSULB") hereby requests review by the full Commission of the actions taken by the Audio Division of the Media Bureau ("Bureau") on December 17, 2007 ("Dismissal Letter"), and December 31, 2008 ("Reconsideration Decision"), first dismissing CSULB's above-captioned application for minor changes in the facilities of noncommercial educational FM ("NCE-FM") station KKJZ, Long Beach, California (the "Application") and then denying CSULB's Petition for Reconsideration of the dismissal.<sup>1</sup> CSULB seeks reversal of the Dismissal Letter and the Reconsideration Decision, denial or dismissal of all adverse pleadings, and reinstatement and grant of the Application. Review should be granted because, in evaluating the Application, the Bureau looked backward rather than forward, stubbornly refusing to take advantage of modern interference prediction techniques that are widely used by the Bureau itself in many other contexts, with the result that the FM broadcast spectrum will be used inefficiently unless the full Commission intervenes.

<sup>1</sup> Public notice of the *Reconsideration Decision* was given in Broadcast Actions, Report No. 46637, released January 6, 2009. Therefore, this application for review is timely filed pursuant to 47 CFR § 1.115(d).

2. Concurrently with this Application for Review, CSULB is submitting to the Commission a petition to resume activity in MB Docket No. 98-93<sup>2</sup> and to reverse the policy set forth in *Certain Minor Changes Without a Construction Permit* regarding use of supplemental methods for contour prediction.<sup>3</sup> As rulemaking is the approach that was suggested by the Bureau in the Reconsideration Decision,<sup>4</sup> and because the Bureau has acted inconsistently in applying interference prediction techniques, resumption of the rulemaking is required, lest the Commission be found to have acted arbitrarily and capriciously. Because of the importance of keeping up to date with technology, as well as the Commission's mandate to promote efficient spectrum use, either this Application for Review should be granted outright or, at a minimum, it should be held in abeyance pending the final outcome of the rulemaking.

3. In sum, and as discussed further *infra*, review by the full Commission is warranted because the Bureau's action applied a precedent or policy which should be overturned or at least modified so as not to apply in the KKJZ situation.<sup>5</sup> Alternatively, Commission review is warranted because the Bureau's inconsistency involves a question of law or policy which has not previously been resolved by the Commission.<sup>6</sup>

4. The Commission's policy regarding the acceptability of supplemental contour prediction methodologies in the FM, and particularly the NCE-FM, context is outdated and in conflict with

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<sup>2</sup> That rulemaking considered, but left unresolved, proposals to adopt more sophisticated methodologies for point-to-point interference prediction. See the *Notice of Proposed Rulemaking*, 23 FCC Rcd. 14849 (1998) and the *Second Report and Order*, 15 FCC Rcd 21649 (2000).

<sup>3</sup> 12 FCC Rcd 12371, 12401-12403 (1997).

<sup>4</sup> *Reconsideration Decision*, at 4 (“[Consideration of supplemental prediction methodologies] can only be properly considered in the context of a notice-and-comment rulemaking. . .”).

<sup>5</sup> 47 C.F.R. 1.115(b)(2).

<sup>6</sup> See 47 C.F.R. 1.115(b)(4) (inviting alternative requests).

Congressional mandates and Commission policy toward the utilization of technological innovations and advancements in methodologies that permit more efficient use of the spectrum. This request for review, above all, seeks reconciliation of the Bureau's action with respect to KKJZ and the Commission's public policy commitment to embrace new technology and advanced methodologies.

### **Question Presented**

5. The question presented to the Commission is:

May the Commission continue to apply an outdated policy statement so as to disregard the application of sophisticated contour prediction methodology in the face of Congressional and Commission actions recognizing that increased efficient use of the spectrum is achievable by modern computer analysis?

### **Background**

6. On September 5, 2007, CSULB filed the Application, seeking a construction permit to modify KKJZ's existing facilities to permit an extension of the station's unique mainstream noncommercial jazz format to important parts of the Los Angeles metropolitan area that the station's signal does not currently reach. In the Application, CSULB sought a waiver of 47 C.F.R. § 73.509, but only because of interference received by KKJZ. No interference would be caused to any other station. CSULB also demonstrated that, by utilization of the Longley-Rice contour prediction method, even any interference that would be predicted to be received by KKJZ from co-channel Class B1 station KCRY(FM), Mojave, CA, if a simpler old computer prediction method was used, was illusory in practice, as demonstrated by more sophisticated predictive technology.<sup>7</sup>

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<sup>7</sup> KKJZ has never argued that actual measurements should be taken rather than computerized interference prediction methods be used. The issue is not whether case-by-case field studies should

7. On October 30, 2007, Santa Monica Community College District ("SMCCD"), licensee of KCRY, filed an Informal Objection to the KJZZ Application in which it alleged neither potential for harm nor injury in fact, but only that, using conventional contour prediction methods, KCRY (a repeater station rebroadcasting programming from KCRW (FM), Santa Monica, CA) is predicted to cause interference to the KJZZ proposal. In its *Response to Informal Objection*, filed Nov. 27, 2007, CSULB reiterated that the application of more sophisticated prediction methods proved the opposite would in fact bear true: any interference will be *de minimis* and will be in an area that is plentifully served by other stations.

8. In the Dismissal Letter, the Bureau denied CSULB's waiver request and dismissed the Application based on findings that KKJZ's proposed facilities would result in prohibited contour overlap with KCRY in violation of 47 C.F.R. § 73.509, though only by virtue of interference received by KKJZ, not interference caused to any other station. SMCCD's Informal Objection was also dismissed as moot. The Bureau staff, citing *Certain Minor Changes Without a Construction Permit*, claimed that CSULB had not provided compelling justification warranting exception to a longstanding Commission policy against uses of supplemental analyses for prediction of interference or contour overlap, even in the NCE-M radio service where the standard mileage separation requirements in 47 C.F.R. § 73.207 do not apply.

9. CSULB timely filed a Petition for Reconsideration on January 22, 2008, on grounds that the Bureau failed to fully evaluate the record before it, which dictated a more nuanced application of the policy against alternative showings, and thus did not afford CSULB the "hard look" required by *WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969). SMCCD filed an

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be entertained but only whether a widely accepted and more accurate computerized methodology should be applied.

Opposition February 7, 2008. CSULB timely filed a Reply February 15, 2008, and a Supplement to the Petition for Reconsideration on April 24, 2008.

10. On December 31, 2008, the Bureau denied CSULB's Petition for Reconsideration. In that Reconsideration Decision, the Bureau specifically acknowledged that no weight was given to CSULB's public interest arguments and that the Bureau disregarded critical points of CSULB's supplemental showings analysis. The instant request seeks full Commission review and the reversal of the Bureau's conclusion.

### **Discussion**

11. The Application was dismissed because it was found to be in violation of Section 73.509 of the Commission's Rules with regard to interference received from KCRY. CSULB's request for waiver of that rule was denied, despite the thorough legal and engineering analysis provided by CSULB demonstrating, through use of the more up-to-date and sophisticated Longley-Rice prediction methodology, that the assumed interference concern is illusory — in fact, when actual terrain data analysis is employed, interference received from KCRY is predicted to be zero. The Commission must not permit the Bureau purposefully to ignore timely and sophisticated data analysis that would promote a more efficient use of the spectrum generally, and in particular would provide noncommercial licensees such as CSULB to better serve the public interest with its highly popular jazz programming.

12. The Bureau, in its Reconsideration Decision, admitted that it did not consider the critical points of CSULB's supplemental analysis before dismissing the Application, and further acknowledged that it did not review those points in reaching its final decision. Nor did the Bureau even acknowledge, as it did in the near-contemporaneous *Centenary College*, DA 08-2630 (rel. Dec. 3, 2008) case, that while the general policy against increases in interference

remains, the Commission has recognized the need for some flexibility in granting 73.509 waivers, particularly in cases of existing NCE-FM stations.<sup>8</sup>

13. Instead of approaching CSULB's waiver request from this flexible perspective, however, the Bureau hid behind a nearly 12 year-old policy statement which, it argued, allowed it to ignore the realities of more than a decade of technological advancement as well as advancement in Congressional and Commission posture toward utilization of more sophisticated prediction methods. Under the "hard look" required by *WAIT Radio*, the Bureau simply cannot be permitted to bury its head in the sand as it did in this case.

14. The same 1997 Report and Order used as cover by the Bureau nevertheless acknowledges that the Commission staff *does* accept supplemental showings under certain circumstances to demonstrate a station's coverage. This concession was not an anomaly. In fact, the Commission over the past decade has repeatedly expanded acceptable uses of Longley-Rice and other sophisticated methods and has even mandated their use where more spectrum efficiency can be achieved.. CSULB's presentation of examples of this evolution of the Commission's posture apparently fell on deaf ears, as they were not even addressed in the Reconsideration Decision. Yet, the Bureau cannot ignore the fact that, in almost every situation where the Commission has had occasion to look at interference prediction since that 1997 policy statement, it has opted for Longley-Rice or similar, more sophisticated methods made possible and practical by the recent availability of powerful computers and software at affordable prices. Moreover, the Commission

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<sup>8</sup> *Centenary College*, DA 08-2630, at 4 (citing the 1981 *en banc* Commission delegation of authority to the staff to waive Section 73.509 to permit small amounts of received interference by NCE-FM stations proposing facility improvements. *Delegation of Authority to the Chief of the Broadcast Bureau to Waive Small Amounts of Interference Received by Non-Commercial Educational FM Proposals*, Public Notice, 49 RR2d 1524 (1981), *modified by* 50 Fed. Reg. 27954 (1985)). *See also Educational Info. Corp.*, 6 FCC Rcd 2207 (1991) ("*EIC*").

must pay heed to Congress' own position vis-à-vis the use of sophisticated prediction methods toward a more efficient use of the spectrum.

15. In its pleadings to the Bureau, CSULB cited many examples that demonstrate the Commission's ever-expanding acceptance of more advanced — and more accurate and reliable — methodologies, which stand in sharp contrast with the Bureau's stance that "the Commission's policy against the acceptance of supplemental studies for the prediction of interference (or lack thereof) in *Certain Minor Changes Without a Construction Permit*" remains steadfast and resolute.<sup>9</sup>

16. In the *Satellite Home Viewer Improvement Act of 1999*, Congress directed to the Commission to adopt an up-to-date predictive method for reliably determining the ability of a particular location to receive an over-the-air digital television signal.<sup>10</sup> Ultimately, the entire digital television table of allotments was built on Longley-Rice propagation prediction because it offers a far more efficient use of the spectrum than could have been achieved through reliance on the old F (50,50) propagation curves and mileage separations formerly used for analog TV channel allotments.<sup>11</sup>

17. Even in the Audio Division itself, the Commission has continued to expand the areas where the Longley-Rice method may be used. In *Hemet, California*, DA 07-4504 (MB, rel. Nov. 2, 2007), the Bureau permitted supplemental analysis by FM allotment proponents using actual terrain data to calculate first and second noncommercial educational service benefits, "because

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<sup>9</sup> *Reconsideration Decision*, at 3.

<sup>10</sup> SHVIA was enacted as Title I of the *Intellectual Property and Communications Omnibus Reform Act of 1999*, Pub. Law 106-113, 113 Stat. 1501, Appendix I (1999) (codified in scattered sections of 17 and 47 U.S.C.).

<sup>11</sup> *See, e.g., Advanced Television Systems and Their Impact upon the MM Docket No. 87-268 Existing Television Broadcast Service*, Sixth Report & Order, FCC 97-115 (1997).

the actual terrain methodology provides a *more reliable* measure of NCE radio services.” (emphasis added) Surely the Commission must step in and direct the Bureau to use a more accurate and reliable methodology in the instant case.

18. In addition to these examples of the use of more sophisticated methodologies, the full Commission has demonstrated its recognition of the merit of wider-ranging policy updates when circumstances change. In *Creation of A Low Power Radio Service*, 22 FCC Rcd. 21912 (2007), at ¶ 63, the Commission altered its very fundamental and basic policy of treating Low Power FM broadcast stations as always secondary, stating that “[c]ircumstances have changed considerably since we last considered the issue of protection rights for LPFM stations from subsequently authorized full-service stations.” The changed circumstances included a significant amount of LPFM application activity and the threat that development of the service would be stifled without a policy change. Likewise, in the case of KKJZ, substantially increased intensity of use of the noncommercial educational FM band in recent years dictates a re-examination of a policy that relies on outdated interference prediction techniques, in order to allow the NCE-FM service to continue to develop.

19. It is clear that the Commission almost universally gravitates toward more rather than less accuracy and sophistication in managing the spectrum and applying its allotment and interference rules. Moreover, where important public interest goals are at stake, the Commission accommodates reasonable proposals, even when some interference may be caused. For example, in several recent rulings, the Commission has authorized new operations by Qualcomm, Inc., notwithstanding considerable amounts of interference caused to television stations, because the Commission is trying to promote the initiation of Qualcomm’s new Media FLO service as an



innovation in the 700 MHz band.<sup>12</sup> In other rulings, the Bureau has allowed digital television stations to agree among themselves to accept interference to facilitate the transition to digital broadcasting without the need for comparative evaluations.<sup>13</sup> As in these examples, there are important public interest goals to be served here, including both expanded availability of KKJZ's unique mainstream jazz format, continued station viability, and the general objective of more efficient use of the noncommercial FM spectrum.

20. As shown in the dismissed Application, the KKJZ proposal would potentially bring the station's mainstream jazz programming format to some 2.4 million new listeners, with a net gain of some 1.7 million, in addition to redirecting the major lobe of radiation from the ocean to populated land areas. As the Commission is well aware, the survival of NCE stations like KKJZ that depend on public contributions for support dictates the need to reach as many listeners as possible. Important areas of West Los Angeles and the San Fernando Valley would gain a reliable signal from KKJZ – a benefit that the Commission must take into account, particularly when no interference will be caused to any other station.

21. Any questions about the irregularity of the terrain and the proper underpinnings for using an alternative prediction methodology were resolved in the Application, which provided a thorough Longley-Rice analysis demonstrating that no interference was predicted to be caused or received from the KKJZ proposal. The public benefit and need to expand KKJZ's service area to provide an adequate listener base to sustain the station's format was also shown.<sup>14</sup> The

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<sup>12</sup> See, e.g., *Letter to Michael E. Carosella, QUALCOMM Inc.*, DA 07-3501, (2007).

<sup>13</sup> See, e.g., *Letter from Clay Pendarvis, Associate Chief, Video Division, to Fox Television Stations, Inc. et al.*, Nov. 17, 2008.

<sup>14</sup> The Bureau's speculation at footnote 4 of the Reconsideration Order about potential constraints on future facilities changes by KCRY was unwarranted. There is no proposal before the Commission to modify the facilities of KCRY; and even if SMCCD filed such a proposal now, it would be subject to the long-established first-come, first-served principle embodied in 47 CFR § 73.3573(e). That rule

Commission has sophisticated and established signal prediction methods at its disposal now. It must use them, and allow applicants to use them, if it is going to fulfill its statutory mandate to administer the spectrum efficiently and comply with the mandate of Section 307(b) of the Communications Act to distribute the use of frequencies fairly and efficiently.<sup>15</sup>


### Conclusion

21. In light of the foregoing, CSULB requests full Commission review and reversal of the conclusions reached by the Media Bureau under delegated authority with respect to the Application.

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February 5, 2009

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often constrains stations in modifying their facilities because of an earlier-filed modification by another station. Moreover, just as the FCC found when it ended the preclusion policy (the policy that formerly required a showing that station improvement proposals would not preclude new entry) with the development of NCE-FM service, it is no longer reasonable to decline increased service today in favor of conjecture over potential, yet undefined service. *Revision of FM Assignment Policies and Procedures*, 90 FCC 2d 88 (1982). As to whether KKJZ might be forced to accept additional interference because of a future site change by KCRY, that is again only speculation; but were such a situation to arise, *EIC provides* precedent for addressing it. Finally, the suggestion that SMCCD would be put to additional time and expense to analyze the impact of a possible future application it might prepare is also overstated, since CSULB has only used only the now well-established Longley-Rice analysis that, as discussed *supra*, the Commission often permits and sometimes even requires applicants to use. CSULB has not applied any unique or unduly burdensome analytical technique that requires anything other than widely available software.

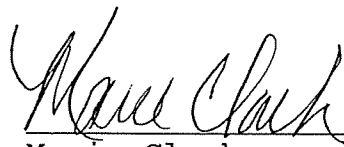
<sup>15</sup> Inconsistency in carrying out Congressional mandates has met with judicial criticism. *See, e.g., NLRB v. Washington Star Co.*, 732 F.2d 974, 977 (1984) (holding that the NLRB's inconsistent application of enforcement policy was arbitrary and capricious because "[t]he present sometimes-yes, sometimes-no, sometimes-maybe policy...cannot...be squared with [the court's] obligation to preclude arbitrary and capricious management of the [agency]'s mandate."). The Commission's "sometimes Longley-Rice, sometimes not Longley-Rice" policies run a similar risk of reversal if corrective action is not taken, in whether in this proceeding addressing the Application, MB Docket No. 98-93, or another rulemaking.

CERTIFICATE OF SERVICE

I, Marie Clark, a secretary at Fletcher, Heald & Hildreth PLC, hereby certify that a true and correct copy of the foregoing "Application For Review" was sent on this 5th day of February 2009, via First-Class United States mail, postage prepaid, or by hand delivery (as denoted by \*), to the following:

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To: Office of the Secretary  
Attention: The Commission

**OPPOSITION TO APPLICATION FOR REVIEW**

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February 20, 2009

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## Summary

As demonstrated herein, California State University, Long Beach Foundation (“CSLB”) filed an application to modify the licensed facilities of station KKJZ(FM), Long Beach, California (“KKJZ”), which included, *inter alia*, increasing the station’s effective radiated power, its height above average terrain, and moving the station’s transmitter more than 19 miles closer to the licensed transmitter site of station KCRY(FM), Mojave, California (“KCRY”), which is owned and operated by Santa Monica Community College District. As a result of CSLB’s proposal, there will be prohibited contour overlap between stations KKJZ and KCRY in violation of Section 73.509 of the Commission’s rules. CSLB therefore has requested a waiver of that rule provision.

Although applicants that seek a waiver of Commission rules bear a heavy pleading burden and “[face] a high hurdle even at the starting gate,” *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969), CSLB has not provided any basis to support its requested waiver. The Commission precedent upon which CSLB relies is inapplicable because stations KKJZ and KCRY are co-channel stations and the extent of the prohibited contour overlap exceeds the 10% limit established by the Commission. Moreover, although CSLB urges the Commission to accept its Longley-Rice alternative terrain analysis, the Commission has made clear that the acceptance of supplemental showings for purposes of determining interference or prohibited contour overlap would represent a fundamental change in the processing of FM applications and would require a notice-and-comment rulemaking proceeding. CSLB has failed to present any compelling reason to support its requested waiver or otherwise demonstrate that there are any special circumstances that warrant a deviation from the Commission’s general rule. Therefore, the Media Bureau acted properly in dismissing CSLB’s Petition for Reconsideration.