

COPY

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

In re Application of)
)
CALIFORNIA STATE UNIVERSITY,) File No. BPED-20070905ABF
LONG BEACH FOUNDATION)
(Long Beach, California))
)
For Minor Change in Licensed Facilities)
of Station KKJZ(FM), Facility Id. 8197)

To: The Commission

FILED/ACCEPTED
MAR - 5 2009
Federal Communications Commission
Office of the Secretary

REPLY TO OPPOSITION

1. California State University, Long Beach Foundation (“CSULB”) herein replies to the opposition (the “Opposition”) to its Application for Review with respect to the above-captioned application (the “Application”) filed on February 20, 2009, by Santa Monica Community College District (“SMCCD”).¹ As demonstrated herein, SMCCD fails to raise any compelling reasons for the Commission to reject CSULB’s request for reversal of the conclusions reached by the Media Bureau under delegated authority with respect to the Application.²

¹ This reply is timely filed pursuant to 47 C.F.R. § 1.115(d).

² Concurrently with the Application for Review filed February 5, 2009, CSULB filed a petition seeking resumption of activity in MB Docket No. 98-93 and the reversal of the policy set forth in *Certain Minor Changes Without a Construction Permit*, 12 FCC Rcd 12371 (1997), regarding use of supplemental methods for contour prediction. This petition for rulemaking is made in the alternative; CSULB continues to seek grant of its Application for Review or, at a minimum, requests that a decision be held in abeyance pending the final outcome of the rulemaking

2. The Opposition fails to rebut CSULB's fundamental argument that the Bureau impermissibly failed to fully evaluate the record before it, which dictated a more nuanced application of the policy against alternative showings, and, thus, the Bureau did not afford CSULB the "hard look" required by *WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969). Rather than address the substance of the questions of law and policy presented by CSULB, the Opposition largely reiterates SMCCD's arguments from below and addresses concerns about the application of precedent and policy only in the context of demanding Commission protection for itself, regardless of the larger legal and policy implications. The Opposition does not refute the evidence that the positions of both the Commission and Congress with regard to more sophisticated prediction methodologies have evolved significantly over the last decade; in fact, SMCCD appears to concede that perhaps this issue is ripe for a rulemaking, suggesting that CSULB is correct in its assertions about the technical superiority of point-to-point prediction methodologies and a need for a change in approach by the Commission.

3. As correctly noted in the Opposition, it is well-established that when an applicant seeks a waiver of a Commission rule, it bears the burden of pleading with particularity the special circumstances and public interest factors warranting the requested Commission action.³ CSULB did just that. It sought a waiver of 47 C.F.R. § 73.509 for theoretical interference to potentially be *received* by KKJZ, not interference to be caused to another station. In its waiver request, supported by subsequent filings with respect to the Application, CSULB provided well-documented and thorough legal and engineering

³ See *Opposition* at 6, citing *Columbia Communications Corp. v. FCC*, 832 F.2d 189, 192 (D.C. Cir. 1987) and *Northwest Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (citing *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969)).

analyses demonstrating, through use of the more up-to-date and sophisticated Longley-Rice prediction methodology, that the interference predicted to be received by KKJZ from co-channel Class B1 station KCRY(FM), Mojave, CA, is *illusory* — in fact, when actual terrain data analysis is employed, interference received from KCRY is predicted to be virtually nil. CSULB further demonstrated that important public interest goals would be served by the waiver grant, including greatly expanded availability to the public of KKJZ's unique mainstream jazz format; continued station viability in difficult economic times; and, importantly, the general objective of more efficient use of the noncommercial FM spectrum.

4. The Opposition's main quarrel with CSULB's waiver request appears to be driven by concerns that utilization of alternative prediction methodologies will result in an overcrowding of the FM band inconsistent with Section 73.509 of the Commission's Rules and the dictates of Section 307(b) of the Communications Act. SMCCD's concerns are reactionary and unfounded. In fact, the use of more sophisticated prediction methodologies will better serve the mandate of fair, efficient, and equitable distribution of FM facilities, not undermine it. In its Application, its pleadings below, and again in its Application for Review, CSULB demonstrated, through presentation of specific examples of the evolution of the Commission's posture, that the Commission over the past decade has repeatedly expanded acceptable uses of Longley-Rice and other sophisticated methods and has even mandated their use to achieve greater spectrum efficiency.⁴ CSULB is not suggesting that the Commission throw caution to the wind;

⁴ CSULB showed that in the *Satellite Home Viewer Improvement Act of 1999*, Congress directed 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

CSULB simply asks that the Commission embrace its own recognition of the need for flexibility in granting 73.509 waivers, particularly in cases of existing NCE-FM stations,⁵ and reconcile its inconsistent treatment of supplemental analyses by acknowledging, as it did in *Hemet, California*, DA 07-4504 (MB, rel. Nov. 2, 2007), that the use of more sophisticated methodologies would actually enhance the policies of Section 307(b) by providing more accurate and reliable measurements.⁶

signal. Title I, *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.). 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. *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).

⁵ *See, e.g., Application for Review at 6; 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)).

⁶ In *Hemet, California*, the Bureau permitted supplemental analysis by FM allotment proponents using actual terrain data to calculate first and second noncommercial educational service benefits, “because the actual terrain methodology provides a more reliable measure of NCE radio services.” (emphasis added). Moreover, in a 2008 decision regarding television market definition, the Media Bureau further acknowledged that “the Longley-Rice model provides a more accurate representation of a station’s technical coverage area because it takes into account such factors as mountains and valleys that are not specifically reflected in a traditional ... contour analysis. In situations involving mountainous terrain or other unusual geographical features, Longley-Rice propagation studies can aid in determining whether or not a television station actually provides local service to a community under the second factor of the market modification test.” *Modification of the Television Market for WBBJ-TV/DT, Jackson, Tennessee*, DA 08-542 (MB, rel. Mar. 10, 2008) (citing *Definition of Markets for Purposes of the Cable Television Broadcast Signal Carriage Rules*, Order on Reconsideration and Second Report and Order, 14 FCC Rcd 8366, 8388, ¶ 50 (1999)).

5. SMCCD also raises the specter of potential preclusionary effects as a basis for the Commission to uphold the Media Bureau's underlying decision. To argue that the Commission ought to be bound by potential constraints on future facilities changes by KCRY – or any licensee – is patently unreasonable, militates against increased diversity of voices in the FM service, and smacks of anti-competitive sentiment. 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 reflects the reality that licensees are often constrained in modifying their facilities because of an earlier-filed modification by another station. The Commission acts on applications that are placed before it and does not evaluate all the possible other options or future business decisions licensees in the market might explore. The FCC formally ended the preclusion policy (the policy requiring a showing that station improvement proposals would not preclude new entry) in 1982;⁷ thus, it is unreasonable for the Commission to decline increased service today in favor of conjecture over potential, yet undefined, service.

6. Finally, SMCCD decries CSULB's "non-technical" justifications for grant of the Application and approval of its waiver request. It is a fact, however, that KKJZ offers a highly popular mainstream jazz programming format not available elsewhere in the market, and access to an adequate listener base is critical to CSULB's ability to continue this service.

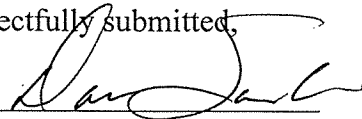
⁷ See *Revision of FM Assignment Policies and Procedures*, 90 FCC 2d 88 (1982).

7. In light of the foregoing, CSULB reiterates its request for 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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March 5, 2009

Respectfully submitted,



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CERTIFICATE OF SERVICE

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

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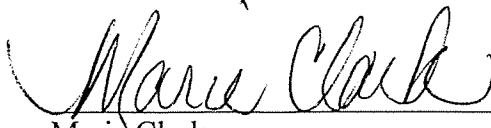
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