

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

CORRECTED

LETTER
May 17, 1994

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Ms. Rebecca L. Dorch
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700 13th Street NW
Washington, D.C. 20005-3960

In reply refer to:
1800B3-DEB

In re: KDAY; Independence, CA
Benett Kessler

Petition for Reconsideration
of BMPH-921002IJ

Application BMPH-931012IK

Dear Ms. Dorch:

This letter is in response to the petition for reconsideration filed on behalf of Ms. Benett Kessler ("Kessler") on September 7, 1993 in response to the staff's August 5, 1993 letter. In that letter, the staff denied Kessler's request seeking waiver of the spacing rule, 47 CFR § 73.207, in minor change application BMPH-921002IJ and dismissed that application. The application proposed Class B facilities for unbuilt station KDAY, Independence, CA in accordance with the *Report and Order* in MM Docket 91-284, 7 FCC Rcd 1738 (1992). Subsequently, on October 12, 1993 Kessler submitted another minor change application (assigned file number BMPH-931012IK) which, if granted, would eliminate the need for the spacing waiver request.

Pursuant to 47 CFR § 73.3519(b), "where an appeal has been taken from the action of the FCC in denying a particular application, another application for the same class of broadcast station and for the same area, in whole or in part, filed by the same applicant, or his successor or assignee, will not be considered until final disposition of such appeal." Accordingly, we will first address the merits of the petition for reconsideration.

Kessler's original application BMPH-921002IJ sought use of a transmitter site atop Silver Peak, which is the presently licensed transmitter site of station KIBS (FM), Bishop, CA. From this site, KDAY would have been spaced 112.3 km from first-adjacent channel Class A station KPAH, Tonopah, NV. However, §73.207 of the Commission's rules mandates that these two stations be separated

by at least 113 km. The application recognized this violation and requested that a *de minimis* spacing waiver be granted for the 0.7 km spacing deficit. In response, the staff's August 5, 1993 letter stated:

[T]he Commission [has] ended its policy of granting spacing waivers of 47 CFR § 73.207. In lieu of granting spacing waiver requests, the Commission substituted the contour overlap provisions of 47 CFR § 73.215 as an alternate means of permitting short-spaced transmitter sites. Since the new rule's adoption, a proposal to locate at a short spaced transmitter site may *only* utilize the provisions of

47 CFR § 73.215. See Paragraph 33 of the *Report and Order* in MM Docket 87-121, 4 FCC Rcd 1681, 54 Fed. Reg. 09800 (1989) as affirmed by the *Memorandum Opinion and Order* in MM Docket 87-121, 6 FCC Rcd 5356 (1991), paragraphs 24-27.

The staff's letter therefore concluded that Kessler's request for waiver of § 73.207 could not be considered; the waiver request was denied and application BMPH-921002IJ was dismissed.¹

The petition for reconsideration takes issue with the staff's decision. The original permit for Channel 292A was obtained by Kessler as the result of a settlement in MM Docket 90-191. That Class A permit (BPH-880519MF) permitted operation with 3 kW ERP at minus 493 meters antenna height above average terrain (HAAT). Subsequently, Kessler sought and obtained a Class B allotment in Docket 91-284. See *Report and Order*, Docket 91-284, 7 FCC Rcd 1738 (1992). The petition states that Kessler almost immediately encountered unforeseen difficulties obtaining a suitable transmitter site for station KDAY's Class B facilities. According to the petition:

Virtually all potential elevated fully-spaced locations were under strict control of the U.S.D.A. Forest Service. Some prospective sites were expressly and strictly limited by the Forest Service to low power communications facilities, electricity was prohibited at others, and other areas were simply not available for commercial use. After an exhaustive search and complicated engineering analyses, Silver Peak was determined to be the only elevated site available for the Class B facility.

For this reason, the application requested waiver of § 73.207 to permit use of the short-spaced Silver Peak transmitter site.

The petition states, that by denying the application, the staff has delayed the institution of first local service to Independence, CA, an underserved community. Regarding *de minimis* spacing waivers, Kessler contends that the *Report and Order* in MM Docket 87-121, *supra*, nowhere explicitly states that waivers of § 73.207 will not be granted. Rather, Kessler believes that § 73.215 was established as an alternative to the spacing rules. Further, Kessler's petition argues that, through the *Notice of Proposed Rulemaking* in

¹ The staff's August 5, 1993 letter also indicated that, because the application was being dismissed for violating § 73.207, another waiver request of 47 CFR § 73.315 regarding coverage of Independence, CA by a 70 dBu field strength signal had not

been evaluated. The § 73.315 waiver request was also made in conjunction with the later application BMPH-931012IK, and is essentially the same. That waiver request is addressed later in this letter.

Revision of 47 CFR § 73.208, Reference Points, and Distance Computations, MM Docket 93-226, 8 FCC Rcd 6200 (1993). "the Commission acknowledged that processing spacing waiver requests is still possible." Kessler also cites several waiver-related cases in support of this position, specifically *R&L Broadcasters*, 7 FCC Rcd 5551 (1992); *John Strelitz*, 6 FCC Rcd 497 (1991); and *Baltimore Radio Show, Inc.*, 5 FCC Rcd 3712 (1990). Kessler's petition concludes that the staff's dismissal action "without distinguishing the cited precedent or rationally explaining the basis of its action, violates the cardinal precepts of administrative law." She contends that the staff did not afford her waiver request the "hard look" called for by *WAIT Radio v. FCC*, 418 F.2d 1153 (1969), and that the dismissal without opportunity for amendment was overly harsh, as the waiver request was denied without consideration of its merits. Nor, according to Kessler, was she served with "full and explicit notice of all prerequisites for such consideration."

We do not agree with Kessler's conclusions. The plain language of Paragraph 33 of the *Report and Order* in MM Docket 87-121, 4 FCC Rcd 1681, 54 Fed. Reg. 09800 (1989), states:

[T]hese rule changes [the adoption of the contour protection rule § 73.215] enable us to discontinue granting waivers of [47 CFR] Section 73.207 for co-channel and adjacent channel short-spacing....

Likewise, Paragraph 34 indicates:

[I]f an applicant proposes a new short-spacing ... then the applicant must comply with the contour protection requirements with respect to that facility (footnotes omitted).

The Commission reaffirmed its position in the *Memorandum Opinion and Order* in MM Docket 87-121, 6 FCC Rcd 5356, 56 Fed. Reg. 57290 (1991), paragraphs 24 to 27, which addressed spacing waivers, including *de minimis* spacing waivers. Paragraph 27 states explicitly:

We viewed the policy of waiving Section 73.207, even if only to permit short-spacing of a mile, as undesirable because it undermines ... the effectiveness of the distance separation table.... We do not believe that additional short-spacing waivers of Section 73.207 would generally be in the public interest where an alternative means of achieving a similar result, such as Section 73.215, is available. Therefore, we will deny requests that we reinstate consideration of Section 73.207 waivers (footnotes omitted).

No appeal of this policy was timely filed. Consequently, Kessler was on notice through both the 1989 and 1991 Federal Register publications that requests for spacing waivers of § 73.207 in applications filed after October 2, 1989 would not be considered, even for *de minimis* spacing waivers, and the underlying rationale therefore had been adequately explained. Kessler's personal lack of knowledge

about the discontinuance of spacing waivers does not justify reconsideration. See *Matthew D. Wiggins, Jr.*, 1 FCC Rcd 401, 402 (1986), *quoting, inter alia*, *Federal Crop Insurance v. Merrill*, 332 U.S. 380 (1947) ("[I]t is well settled that under 44 U.S.C. § 1507 publication in the Federal Register constitutes constructive notice of Commission processing requirements regardless of whether a particular applicant has no actual notice"). See also *Ann D. Genthner*, 1 FCC Rcd 399 (1986); *Star Signal Corporation*, 1 FCC Rcd 405, 406 (1986).

The precedents cited by Kessler's petition for the proposition that the Commission continued to grant waivers of § 73.207 even after the adoption of § 73.215 are inapposite. *R&L Broadcasters*, 7 FCC Rcd 5551, *John Strelitz*, 6 FCC Rcd 497, and *Baltimore Radio Show, Inc.*, 5 FCC Rcd 3712, each dealt with applications filed prior to October 2, 1989 – applications which were eligible to file spacing waiver requests by virtue of their having been filed prior to the effective date of § 73.215. See *Report and Order*, MM Docket 87-121, *supra*, at paragraph 50. Kessler's application, by contrast, was filed on October 2, 1992, three years too late for consideration under the former policy.²

Regarding the *Notice of Proposed Rulemaking* in MM Docket 92-226, 8 FCC Rcd 6200, the reference to spacing waiver requests therein does not supersede the policy of discontinuing spacing waiver requests explained in MM Docket 87-121, as stated expressly in Footnote 1 of the *NPRM*. That rulemaking was limited to clarifying the procedure for the determination of spacing between two points in those instances where an applicant does not meet any of the Commission's minimum spacing requirements such as those set forth in §§ 73.213(c), 73.215(e), and 73.207 for existing short-spaced stations, or for applications filed prior to the effective date of § 73.215. It does not alter the procedures which are employed in processing applications for new short-spacings filed after the effective date of § 73.215.

Finally, we address Kessler's contention that the simultaneous denial of her spacing waiver request and the dismissal of her application without notice of the defect cited in the staff's August 25, 1993 letter was "overly harsh" and void of "fundamental fairness." On July 27, 1992, when the Commission announced that the strict "hard look" processing system for commercial FM applications was to become more lenient, it defined the policy applicable to waiver requests in the following terms:

Our *Notice [of Proposed Rulemaking]* in Docket 91-347, 6 FCC Rcd 7265, 56 Fed. Reg. 65721 (1991) proposed that an applicant will not be able to cure defects resulting from the denial of a waiver request. We reasoned that an applicant's decision to file a waiver request is not an error but a conscious choice, unlike tender or acceptance defects which are usually inadvertent.... Based on the reasoning in the *Notice*, we will not permit corrective amendment of defects that result from staff denial of a waiver request. We have also decided not to consider alternatives to waiver requests supplied in the event of denial of the

² Kessler also notes that short-spacings of less than 0.5 km are "not cognizable" and do not require waiver of § 73.207 [or processing pursuant to § 73.213 or § 73.215]. See, e.g., Footnote 10, *Report and Order*, MM Docket 87-121, *supra*. However,

Kessler's proposed 0.7 km short-spacing does not fall into that category. Consequently, any policies or procedures applicable to "not cognizable" short-spacings cannot be applied to Kessler's 0.7 km short-spacing request.

waiver.... Because consideration of waiver requests generally requires significantly more effort than the processing of routine applications, an increase in the number of waiver requests would lead to disproportionate delays in the processing of other applications. In the interest of efficient use of our limited staff resources, applicants submitting waiver requests will not be given any opportunity to cure defects resulting from denial of their waiver requests, even if the original application contains the curative information as an alternative.

Report and Order, MM Docket 91-347, 7 FCC Rcd 5074, 57 Fed. Reg. 34872 (1992), paragraph 22, *recon. denied*, 8 FCC Rcd 7572 (1993). Therefore, Kessler was on notice of the waiver processing procedures -- and of the fact that an applicant denied a waiver request would not be permitted to amend its defective proposal -- through the publication of this docket in the Federal Register. See, e.g., *Matthew J. Wiggins, Jr.*, 1 FCC Rcd at 402; *Ann D. Gentner*, 1 FCC Rcd 399; *Star Signal Corporation*, 1 FCC Rcd at 406. The staff was acting in accordance with this policy when it denied Kessler's spacing waiver request and simultaneously dismissed application BPH-921002IJ on August 25, 1993. As such, Kessler was treated no differently than other similarly situated applicants.

Based on the foregoing discussion, we find that the actions taken in the staff's August 25, 1993 letter denying the request for waiver of 47 CFR § 73.207 and dismissing application BPH-921002IJ were proper and in keeping with established and published Commission procedures. Therefore, the petition for reconsideration will be denied.

We now turn to the more recently filed minor change application BMPH-931012IK. That application seeks use of the same transmitter site (Silver Peak) specified in Kessler's previous application BPH-921002IJ, but requests processing pursuant to the contour protection rule, 47 CFR § 73.215, with respect to first-adjacent channel Class A station KPAH, Tonopah, NV. Staff study confirms that the proposal meets the minimum separation requirements of § 73.215(e) and that the directional antenna proposed provides the necessary contour protection to KPAH, in compliance with the rule. Consequently, the later application successfully avoids the deficiency which resulted in the dismissal of the previous application.

However, using the contour prediction procedures in 47 CFR § 73.313, this minor change application does not provide any 70 dBu coverage to the community of Independence, CA, as required by 47 CFR § 73.315(a). From the Silver Peak transmitter site, KDAY's 70 dBu contour is predicted to extend 27.4 km in the direction of Independence. Independence itself lies 67 km from the proposed transmitter site. Consequently, Independence lies far outside the proposed 70 dBu coverage contour of KDAY. Acknowledging this, Kessler has requested that § 73.315(a)

be waived and has submitted a supplemental showing pursuant to § 73.313(e) to show that the 70 dBu contour toward Independence, as predicted by alternate contour prediction methods, is actually much larger than predicted by the Commission's methodology.

In support of this waiver request, Kessler cites the lack of alternate available elevated transmitter sites from which service can be provided to Independence. In this regard, Kessler repeats the same factors presented in its previous application BPH-921002IJ.³ See Page 2, *supra*. She also stresses that, if authorized as requested, KDAY will provide a first local service to the residents of Independence, CA and the surrounding underserved "gray area". Kessler notes that Independence, a small community of 622 persons, lies in the Owens Valley, a narrow north-south valley more than 200 miles long surrounded on the east by the Inyo mountains and the Sierra Nevada range on the west. This valley carries Interstate I-395, used by approximately 5 million travellers annually. Within this valley, only Class B station KIBS, licensed to Bishop, CA, which is also located at the proposed Silver Peak transmitter site, is clearly received in Independence. Kessler contends that KIBS' programming is not oriented toward Independence or southern Inyo County. The only station whose protected service area encompasses Independence is KRHV, Big Pine, CA, which is unbuilt as of this date. No other station's predicted protected service area (including that of KIBS) approaches Independence.

The supplemental showing submitted pursuant to § 73.313(e) is provided to show the actual propagation of the 70 dBu contour toward Independence. The showing locates the proposed Silver Peak transmitter site almost due north of the community of Independence and demonstrates direct line-of-sight to the community. Because the intervening terrain is virtually all desert, with sparse vegetation, the signal is attenuated significantly less than is predicted by the standard contour prediction method in § 73.313. By using the Longley-Rice propagation model, Kessler has concluded that 79 persons (12% of the total population of 622) and 2.4 sq. km (62.6% of the area) within the legal boundaries of Independence will receive 70 dBu or better service from KDAY. All of the population and area will receive a signal strength in excess of 69.5 dBu (3.02 mV/m).⁴ In addition, shadow maps provided by Kessler show that no line-of-sight obstructions exist between Silver Peak and Independence, resulting in less than average attenuation of KDAY's proposed signal. Kessler has also cited several waiver-related precedents in support of her waiver request including, *inter alia*, *Dakota-North Plains Company*, 67 FCC 2d 870, 871 (1977) (granting a waiver to an applicant providing only 68.3 dBu over the community of license); *Nagutabo Broadcasting Company*, 5 FCC Rcd 2062, 2069 (ALJ 1990), *aff'd* 6 FCC Rcd 912, *aff'd in relevant part* 6 FCC Rcd 4879, 4880 n.5 (1991) (denying a waiver request to an applicant who proposed to provide a signal strength over the community of license of 49.9 dBu on the

³ In application BMPH-931012IK, Kessler also adds that the proposed transmitter site protects the Owens Valley Radio Astronomy Observatory, operated by the California Institute of Technology, located just north of Big Pine, CA.

⁴ Here, the supplemental showing digresses to note that in 1962, the Commission adopted the 3.16 mV/m or 70 dBu contour as defining the minimum signal strength to be placed over the community of license, replacing the earlier 3.0 mV/m (69.54 dBu) standard. *Notice of Proposed Rulemaking*, Docket 14185,

21 RR 1665, 1687 (1961); *First Report and Order*, Docket 14185, 23 RR 1801, 1824 (1962). Although the Commission made this change "for convenience," the revised standard has remained in force for almost 32 years, and has been applied to every FM commercial application since that time. We see no valid reason why the old standard should suddenly be resurrected to apply solely to the present application. We further note that even if the old standard were utilized, it would not affect the outcome reached in this decision.

ground that the proposal relied on the applicant obtaining a translator authorization to provide city coverage and thus was regarded as highly speculative); *Greater Media, Inc.*, 38 RR 2d 1542, 1544 (1976) (compliance with § 73.315(a) obtains when 50% of the measured points in the community of license receive field strengths of 3.16 mV/m (70 dBu) or greater). Considering all the factors summarized above, Kessler believes that waiver of § 73.315(a) is warranted to permit KDAY to commence operation as proposed from Silver Peak.

We have examined Kessler's waiver request in detail and conclude that we must deny it. First of all, as noted above, Kessler's application acknowledges that, even when the supplemental analysis is employed, the predicted 70 dBu contour of KDAY would only encompass 12% of the population and 62.6% of the area within the legal boundaries of Independence. The Commission's former rule requiring 100% coverage of the community of license was relaxed in *John R. Hughes, et. al.*, 50 Fed. Reg. 5679 (February 11, 1985), which stated that the community coverage requirement would be substantially complied with where at least 80% of the area within the legal boundaries of the community of license was covered by a 70 dBu or greater signal. However, Kessler's application falls far short of that relaxed requirement.

Moreover, we note that Independence, CA is not only far outside the 70 dBu community coverage contour, as predicted pursuant to the standard contour prediction method in § 73.313(e), but is located 6 km outside the 54 dBu protected contour as well. None of the cases cited by Kessler involve communities outside the protected contour of the station. Rather, the community of license in the cited cases lay between the predicted 70 dBu and the protected service contours.⁵ This represents the first instance known to the staff of an applicant seeking to provide service to a community of license outside its predicted protected contour.

The minimum separation requirements in § 73.207 and the contour protection rules in § 73.215 are designed to permit minimally-spaced stations to operate with generally interference-free service within each station's protected service contour. For Class B stations, such as KDAY, the protected service contour is the 54 dBu contour. Outside of this contour, interference from other cochannel and adjacent channel stations can occur under our rules. It simply is not possible, under any rational allocations scheme, to protect FM stations to the point at which the signal is too weak to receive. Thus, the potential exists that another station could be authorized or modified which would not interfere within KDAY's 54 dBu protected service contour, but would interfere with KDAY's service to Independence.

were Kessler's proposed Silver Peak operation to be implemented." KDAY would have no standing to contest any interference created in this manner, since the Commission's rules do not protect any service outside the 54 dBu protected contour.

The association of a broadcast station with a community of license is a basic tenet of the Commission's allocations scheme for broadcast stations. Section 307(b) of the Communications Act of 1934, 47 U.S.C. § 307(b), mandates that the "Commission shall make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution to each of the same." Implicit in this statement is a recognition that the Commission must protect such service to the community of license from interference from other stations. Moreover, the community coverage rule is designed to insure that the community of license receives a premium signal. *Lester H. Allen*, 17 FCC 2d 225, 226 (1969). In the present instance, such assurance cannot be given.

Consequently, even had the supplemental showing demonstrated 70 dBu coverage of Independence (which it does not), the waiver request would not have been found to be in the public interest due to the potential loss of service to Independence at a future date. The factors cited in support of the waiver request -- lack of alternate elevated sites, first local service to an underserved area, terrain and propagation factors -- do not outweigh this potential loss. Simply put, the Commission will not authorize a broadcast station to serve a community of license located outside its protected service contour, as predicted by the standard contour prediction method in § 73.313(e), since service to that community cannot be protected from interference under our rules. Therefore, the request for waiver of 47 CFR § 73.315 will be denied.

Accordingly, in view of the foregoing, the petition for reconsideration against the August 25, 1993 dismissal of application BMPH-9210021J IS HEREBY DENIED. In addition, the request for waiver of 47 CFR § 73.315(a) in application BMPH-9310121K IS HEREBY DENIED, and the application, being unacceptable for filing, IS HEREBY DISMISSED. These actions are being taken pursuant to 47 CFR §§ 0.283, 73.3519(b), and the policies explained in the *Report and Order*, MM Docket 91-347, 7 FCC Rcd 5074, 57 Fed. Reg. 34872 (1992), *recon. denied*, 8 FCC Rcd 7572 (1993).

Please be advised that we will expedite consideration of an application for another transmitter site in order to expedite the institution of new service to Independence, CA, consistent with the Commission's rules and policies.

⁵ Even in *Naguabo Broadcasting Company, supra*, where the ALJ considered (but then rejected) a request to permit the applicant to provide only a 49.9 dBu signal over the community of license, the community of license did not lie outside the proposed station's protected service contour as predicted by the standard contour prediction method in § 73.313. Rather, the 49.9 dBu signal strength over the community of license (Naguabo, PR) resulted from a terrain obstruction not accounted for by the standard method, necessitating use of a supplemental method of signal strength prediction.

⁶ This situation, were it to occur, could put KDAY's license renewal at risk from a competing applicant claiming that KDAY was not serving its community of license.

⁷ § 73.215 applicants and the stations being protected by this rule are limited to use of the standard contour prediction method in § 73.313(c), (d)(2), and (d)(3), and are not permitted to use supplemental showings to show contour protection or lack thereof. See 47 CFR § 73.215(a)(3); see also the *Memorandum Opinion and Order* in MM Docket 87-121, *supra*, paragraphs 9, 12. Thus, Kessler could neither employ nor invoke a supplemental showing to prevent interference in Independence, CA (e.g., by trying to show that KDAY's 54 dBu protected contour extends further than predicted by the standard contour prediction method).

Sincerely,

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cc: Ms. Benett Kessler
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