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March 24, 2017

Robert J. Robbins  
Call Communications Group, Inc.  
P.O. Box 561832  
Miami, FL 33256-1832

In re: **WMKL(FM), Hammocks, FL**  
Facility ID No. 61087  
File No. BPED-20161104AAB

Dear Applicant:

This letter refers to the above-referenced minor change application (Application) filed by Call Communications Group, Inc. (Call) for noncommercial educational FM Station WMKL(FM) to increase its effective radiated power (ERP) from 50 kilowatts (kW) to 100 kW on Channel 220.<sup>1</sup> In the Application, Call requests a waiver of Section 73.511 of the Commission's Rules (Section 73.511).<sup>2</sup> For the reasons stated below, we deny Call's waiver request and dismiss the Application.

**Waiver request.** An engineering study of the Application reveals that it is in violation of Section 73.511. Specifically, the Application proposes a Class C2 facility with an ERP of 100 kW. However, under Section 73.511, the ERP for a Class C2 FM station cannot exceed 50 kW.<sup>3</sup> This violation constitutes an acceptance defect. Call recognizes this defect and requests waiver of Section 73.511.

In support of the waiver request, Call argues that its proposed reference contour distance, using an ERP of 100 kW and the proposed height above average terrain (HAAT) of 106 meters, equals the reference contour distance of a maximum Class C2 (50 kW ERP at 150 meters HAAT) facility.<sup>4</sup> Moreover, Call argues that the proposal would have no impact on the adjacent channel stations in the non-reserved band because the station would remain a Class C2 station, and therefore, the spacing requirement would remain the same. Call also states that stations on Channels 218, 219 and 220 are at a disadvantage because they have to comply with both the spacing rules of the non-reserved band and the contour overlap rules of the reserved band whereas stations on the reserved band below Channel 218 must comply only with the contour overlap rules. Call also claims that this waiver would not create a precedent for future waivers because, based on a database search using certain parameters, it believes that only 12 stations could potentially benefit from the same type of waiver.

In addition, Call believes that the proposal would increase the served population by 141 percent (from 478,308 people to 1,151,470 people) and alleviate interference to its in-band-on-channel (IBOC) signal.

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<sup>1</sup> Call also proposes to change the directional antenna pattern of WMKL.

<sup>2</sup> 47 CFR § 73.511. Call actually requests a waiver of 47 CFR § 73.211. However, because WMKL is a non-commercial station in the reserved band, Section 73.511 is the relevant provision. Section 73.511, in pertinent part, refers to Section 73.211.

<sup>3</sup> Call's proposed ERP of 100 kW equals the maximum ERP of a Class C1 facility.

<sup>4</sup> The reference distance is based on the 60 dBu protected contour distance.

Call also states that the WMKL antenna is at the top of the present tower and the Florida building code requirements for high winds make constructing a taller tower cost prohibitive.<sup>5</sup> Furthermore, Call argues that main studio waivers are routinely granted based on cost savings to non-commercial educational stations. Finally, Call cites a construction permit for Station WBKU(FM), Ahoskie, NC (File No. BMPED-20010518ABD) (WBKU Application), as a previous instance where a station on Channel 219 was granted a Class C2 facility with an ERP of 87 kW. Therefore, Call concludes that a waiver of Section 73.511 is warranted in this instance.

**Discussion.** The Commission's rules may be waived only for good cause shown.<sup>6</sup> An applicant seeking a rule waiver has the burden to plead with particularity the facts and circumstances that warrant such action.<sup>7</sup> The Commission must give waiver requests "a hard look," but an applicant for waiver "faces a high hurdle even at the starting gate"<sup>8</sup> and must support its waiver request with a compelling showing.<sup>9</sup> The Commission may exercise its discretion to waive a rule where the particular facts make strict compliance inconsistent with the public interest.<sup>10</sup> In addition, the Commission may take into account considerations of hardship, equity, or more effective implementation of overall policy on an individual basis.<sup>11</sup> However, waiver of the Commission's rules is appropriate only if both (i) special circumstances warrant a deviation from the general rule, and (ii) such deviation will serve the public interest.<sup>12</sup> As discussed in detail below, Call's request fails to present good cause for waiver of Section 73.511. Call has not shown special circumstances that would justify such a waiver. Furthermore, the facts and circumstances set forth in the waiver request are insufficient to establish that granting waiver of Section 73.511 would be in the public interest.

**Special circumstances.** We find that received interference to WMKL's IBOC signal does not constitute a "special circumstance" warranting waiver. Any station that has elected to utilize an IBOC signal in an urban environment may experience similar interference issues. Moreover, all stations on Channels 218, 219 and 220 are bound by the same spacing and overlap restrictions. To the extent that a licensee or applicant seeks to change a rule of general applicability, the correct vehicle would be a petition for rulemaking. Notwithstanding Call's database inquiry results, we conclude that there could be many other broadcast stations that, for various reasons, might prefer to operate at a lower height but higher power than permitted by the Rules. For example, whereas Call's search only included stations already at maximum class ERP, stations currently below maximum class ERP may also seek to increase power beyond their class maximum ERP. Similarly, although Call only considered stations that are currently below maximum HAAT, a station that is currently at maximum HAAT might also choose in the future to modify its facilities to a lower HAAT if the option to increase ERP to compensate was generally available. Therefore, we find that the proposed waiver could potentially affect a large number of stations and undermine the operation and purpose of Section 73.511, as discussed in greater detail below. For all of these reasons, we find that Call has failed to demonstrate special circumstances to justify its waiver request.

**Precedent.** Call's reliance on the 2001 staff grant of the WBKU Application is misplaced. The WBKU Application was granted in error and is not representative of Commission policy or practice then or now. No written waiver was issued in connection with the WBKU Application, and the erroneous station

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<sup>5</sup> Call also believes that environmental concerns make it difficult to construct a new taller tower in an area that borders both Everglades National Park and Big Cypress National Preserve.

<sup>6</sup> 47 CFR § 1.3.

<sup>7</sup> See *Columbia Communications Corp. v. FCC*, 832 F.2d 189, 192 (D.C. Cir. 1987) (citing *Rio Grande Family Radio Fellowship, Inc. v. FCC*, 406 F.2d 644, 666 (D.C. Cir. 1968)).

<sup>8</sup> See *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969), *aff'd*, 459 F.2d 1203 (1972), *cert. denied*, 93 S.Ct. 461 (1972) (*WAIT Radio*); *Thomas Radio v. FCC*, 716 F.2d 921, 924 (D.C. Cir. 1983).

<sup>9</sup> *Greater Media Radio Co., Inc.*, Memorandum Opinion and Order, 15 FCC Rcd 7090 (1999) (citing *Stoner Broadcasting System, Inc.*, Memorandum Opinion and Order, 49 FCC 2d 1011, 1012 (1974)).

<sup>10</sup> *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (*Northeast Cellular*).

<sup>11</sup> *WAIT Radio*, 418 F.2d at 1159; *Northeast Cellular*, 897 F.2d at 1166.

<sup>12</sup> *NetworkIP, LLC v. FCC*, 548 F.3d 116, 125-128 (D.C. Cir. 2008); *Northeast Cellular*, 897 F.2d at 1166.

classification has since been corrected. In any case, the grant of the WBKU Application is not precedential and may not be relied on or cited as precedent except against persons who have actual notice of the document in question or by such persons against the Commission.<sup>13</sup>

*Public interest.* When it adopted Section 73.211 in 1965, the Commission directly addressed the impact of an increased ERP beyond the maximum allowed by Section 73.211(b) when the antenna height is less than the maximum for that class.<sup>14</sup> Specifically, the Commission stated that “comparing a given increase in height with a given increase in ERP, an increase in height increases service more than it does interference, whereas an increase in power increases interference more than it does service.”<sup>15</sup> Although the reference distance proposed in the Application equals the Class C2 reference distance, the proposed interfering contours would increase beyond Class C2 distances. Thus, Call’s proposal would have the potential to cause more interference to other stations, including stations that are fully spaced. This potential to cause undesirable interference far outweighs Call’s claims that WMKL would increase its served population by 141 percent or that there may not be any other way to improve its facility. The Commission has long and repeatedly held that it favors lesser but adequate coverage to greater coverage from facilities that do not comply with core interference rules.<sup>16</sup>

Finally, we reject Call’s argument that cost savings is an appropriate consideration for waiver in these circumstances. Main studio waivers are non-technical and therefore may be granted based on cost saving reasons. However, the Commission has long refused to grant waivers of technical rules based on non-technical considerations. In *Open Media Corporation*, the Commission stated:

[E]ven though [the applicant] seeks to achieve what it believes to be a commendable objective, it is well established that our policy of refusing to base waivers of rules designed to prevent interference upon non-technical considerations...is a rational implementation of our mandate to “[m]ake such regulations not inconsistent with law as [we] may deem necessary to prevent interference between stations.”

47 U.S.C. Section 307(f). This policy has been approved by the courts.<sup>17</sup>

For all of these reasons, we find that the public interest would not be served by granting Call’s waiver request.

**Conclusion.** In light of the above, Call Communication Group, Inc.’s request for waiver of 47 CFR § 73.511 IS HEREBY DENIED and Application File Number BPED-20161104AAB IS HEREBY DISMISSED as unacceptable for filing. These actions are taken pursuant to 47 CFR § 0.283.

Sincerely,

A handwritten signature in blue ink, appearing to read "Rodolfo F. Bonacci", with a stylized flourish at the end.

Rodolfo F. Bonacci  
Assistant Division Chief  
Audio Division  
Media Bureau

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<sup>13</sup> 47 CFR § 0.445(e).

<sup>14</sup> See *Revision of Broadcast Rules, Particularly as to Allocation and Technical Standards*, First Report and Order, 40 FCC 662, 682, 690 (1965).

<sup>15</sup> *Id.* at 690.

<sup>16</sup> See *Board of Education of the City of Atlanta (WABE-FM)*, Memorandum Opinion and Order, 82 FCC 2d 125, 127 (1980); *Open Media Corporation*, Memorandum Opinion and Order, 8 FCC Rcd 4070, 4071 (1993) (*Open Media*); *Educational Information Corporation*, Memorandum Opinion and Order, 6 FCC Rcd 2207, 2208 (1991)

<sup>17</sup> *Open Media*, 8 FCC Rcd at 4071 (citations omitted).