

KRMS STAFFS DIVISION

41205

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In re Application of)
)
Mercer Island School District #400)
)
For a Minor Modification of Construction)
Permit for KMIH(FM), Mercer Island, WA)
)

File No. BMPED-20071228ABS
Facility ID No. 41205

To: Secretary, FCC
Attn: Chief, Audio Division,
Media Bureau

FILED/ACCEPTED
FEB - 4 2008

Federal Communications Commission
Office of the Secretary

PETITION TO DENY

Pacific Lutheran University, Inc. (the "University"), licensee of FM station KPLU-FM, Tacoma, Washington, by its counsel and pursuant to Section 73.3584 of the Commission's Rules, petitions to deny the above-captioned "minor modification" of construction permit application of Mercer Island School District #400 ("MISD") to convert non-protected Class D station KMIH(FM), Mercer Island, Washington to a protected Class A status.

Background

MISD filed an application for a minor modification of KMIH(FM) on March 27, 2006, in FCC File No. BPED-20060327AIM, seeking to move from a commercial FM frequency to a noncommercial channel second adjacent to KPLU-FM. The FCC went to great lengths in waiving multiple rules and policies to grant the application on September 20, 2006. MISD has now filed the above-captioned application for a minor modification of the resulting KMIH construction permit on December 28, 2007, requesting a change from Class D to Class A status. Public Notice of the acceptance for filing of the modification of permit application appeared on

January 3, 2008.¹ This Class A application flies in the face of FCC policy, the University's goodwill, and sound precedent.

The KMIH Class D construction permit application in File No. BPED-20060327AIM included a request for a waiver of Section 73.509(b) of the FCC's rules due to interference caused to Stations KPLU-FM and KNHC(FM), Seattle, Washington, in violation of that rule. In processing the application and waiver request – and in a drastic departure from prior policy, rules, and precedent – the Commission issued an Order to Show Cause to the University on May 23, 2006 (copy attached within Exhibit B), noting that grant of the KMIH application would result in KMIH causing second adjacent channel interference to KPLU-FM, and ordering the University to show why its license should not be modified by the grant of the KMIH application. The University's June 29, 2006 response (copy attached as Exhibit B) to the Order to Show Cause stated that while the University did not object to the grant of the KMIH application (in part "as an accommodation by one educator to another"), it did object to:

...any modification of the KPLU-FM license that would compromise in any manner its right to be protected full against any *actual* interference that may be caused by KMIH to KPLU-FM listeners, or that would infringe on [the University]'s right to implement the construction permit it currently holds for KPLU-FM (File No. BPED-20060109ABR) which might be anticipated to cause greater interference to KMIH, or that would prevent [the University] from making further changes in KPLU-FM's facilities otherwise permitted by FCC rules because of any possible adverse impact on KMIH.²

The University's response continued: "KMIH, as a Class D station, has 'secondary' status, and the order to show cause procedure **cannot and should not be used to bootstrap the**

¹ This Petition is therefore timely filed. In addition, please note that other than as set forth in the attached Engineering Statement, the facts set forth in this Petition are taken from FCC applications, correspondence, and other documents. The FCC may take official notice of these records.

² Response to Order to Show Cause at 2.

station into a primary status.”³ The University further showed that “[c]onsistency in the treatment of Class D stations in this case requires the Commission to confirm that KMIH remains a secondary service that will be subject to new allotment proposals or modifications proposed by primary stations in the Seattle market, including any future changes proposed by KPLU-FM.”⁴

In a July, 2006 email exchange with FCC staff, MISD agreed to the conditions imposed by the University in its Response to the Order to Show Cause. *See* Exhibit C. As a result, in granting the KMIH application, the Commission imposed several special conditions on MISD, including: “This construction permit is for a Class D secondary station;” “Future modifications of KPLU-FM, Facility ID No. 51199, will not constitute a ‘per se’ modification of KMIH’s license;” and “Pursuant to the staff’s letter dated September 20, 2006, KMIH must promptly eliminate any interference caused to KPLU-FM or KNHC(FM) using the facilities authorized by this construction permit.” *See* copy of construction permit attached as Exhibit D.

Argument

Despite the clear record in this case, MISD has now applied, fewer than sixteen months after grant of the KMIH Class D modifications, to do exactly what the University and Commission foresaw as a possibility and arranged to prevent: attempting to bootstrap the station from secondary into a primary status. To make matters worse, MISD did not notify the University or discuss the issue at all in its application, choosing instead to ignore the special efforts and accommodations of the University and the FCC with respect to MISD’s 2006 application.

³ Id. at 3 (emphasis added).

⁴ Id. at 3-4.

MISD's modification of permit application "proposes no change in technical parameters...except for a change from Class D status to Class A status."⁵ Accordingly, with this application to change from a secondary to primary class station, MISD is straight-forwardly seeking to establish increased interference protection with respect to KMIH. This application therefore flies in the face of the FCC's recent waiver request processing for KMIH, the Order to Show Cause proceeding, and the special operating conditions in the construction permit that MISD now seeks to modify. The University strongly and resolutely opposes this change in KMIH's status.

As detailed in the attached Engineering Statement of Hatfield & Dawson Consulting Electrical Engineers (attached as Exhibit A), operation of KMIH on Channel 205A with the requested facilities will result in prohibited contour overlap to second adjacent KPLU-FM (and also to third-adjacent KNHC) in violation of Section 73.509 of the FCC's Rules. As the Engineering Statement further explains, the KMIH modification of permit application attempts to avail itself of Section 73.509(d) (regarding modifications involving previously existing overlap) without any mention of KPLU-FM or KNHC, without explanation of the presence of "existing" overlap (or the incredibly unique circumstances as to how that overlap came to be), and without any request for waiver.

Accordingly, the KMIH application is plainly an effort to ignore the complicated history of its recent Class D overlap waiver – and the fact that the FCC's extraordinary leniency in allowing that overlap was completely conditioned on the University's consent and on the fact that KMIH is a secondary Class D station not entitled to interference protection – in order to

⁵ BNPED-20071228ABS at Exhibit 16.

quickly sanction, with primary Class A status-enhanced protection, its very limited allowance of “existing” secondary Class D overlap.

Although MISD agreed to the University’s conditions in 2006 regarding grant of its Class D modification and overlap – such as not using the process to bootstrap KMIH from secondary to primary status, and not compromising, in any manner, the University’s right to be protected fully against actual interference that may be caused by KMIH to KPLU-FM listeners – MISD is now attempting to do both. With its modification of permit application, MISD is trying to quietly (without any mention of KPLU-FM in the application, or service of the filing upon the University) transfer its limited Class D overlap waiver to a full Class A authorization. Given that MISD applies for no changes except the change in class, this application directly attempts to increase KMIH’s interference protection even though such a change would come at the direct expense of KPLU-FM, which previously accepted the overlap from KMIH (despite the clear violation of FCC Rules) only because KMIH was a secondary Class D station.

Furthermore, the Commission has traditionally disfavored attempts by Class D stations to achieve Class A status in the manner proposed. In *Lakeside Telecommunications, Inc.*,⁶ the Commission denied reconsideration of the dismissal of a Class D station’s application to increase power and change to Class A status. In so doing, the Commission explained that Class D stations had already been provided “with generous opportunities to enable continued operation,” including a prior application process which offered the “opportunity to upgrade to Class A operations.”⁷ The Commission noted that the Class D station had failed to avail itself of that

⁶ Memorandum Opinion and Order, FCC 04-298 (Rel. Jan. 5, 2005).

⁷ *Id.* at 4.

opportunity, and the Commission declined to afford the station special relief (which was beyond the reach of other Class D stations) to do so after the fact.⁸

As explained in the Engineering Statement, this attempt to bootstrap Class A status on a Class D-approved overlap requires, at the very least, an additional waiver request. MISD failed to request such a waiver, much less plead with particularity facts and circumstances to support it.⁹ Its application is therefore defective.

In addition, as the Engineering Statement also details, the KMIH modification of permit application further violates FCC Rules by creating prohibited overlap with the application of Way-FM Media Group, Inc., as filed during the FCC's October, 2007 noncommercial educational filing window for a new noncommercial educational FM station on Channel 206C1 at Skykomish, Washington.¹⁰ The Commission, in establishing the window filing system for NCE FM station applications under the point system, stated:

Under the new window filing procedures, the specific facilities proposed in applications filed during a window will receive cut-off protection, and will be protected pursuant to our existing interference rules, as of the date of the closing of the window filing period. After the Closing Date of the window, no application (such as minor modification applications) may be filed that would conflict with the applications filed during the window.¹¹

The KMIH modification of permit application was filed in December, 2007, after the filing window, and fails to provide the requisite protection for the prior-filed, first adjacent

⁸ Id.

⁹ 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) (per curiam)).

¹⁰ FCC File No. BNPED-20071012ATS.

¹¹ *In the Matter of Reexamination of the Comparative Standards for Noncommercial Educational Applicants*, Report and Order, MM Docket No. 95-31, FCC 00-120 (Rel. Apr. 21, 2000) at ¶ 87.

Skykomish window application. The proposed Skykomish facility's 54 dBu contour overlaps more than half of the proposed KMIH 60 dBu contour. *See* Engineering Statement. As the Engineering Statement further explains, this overlap violation cannot be cured by alternative overlap methodologies, and no waiver of Section 73.509 is requested by the KMIH application. Accordingly, the KMIH application is defective under Section 73.3566 of FCC's Rules, which states that applications which are "patently not in accordance" with the Rules, "unless accompanied by an appropriate waiver request for waiver, will be considered defective" and will not be accepted for filing or will be dismissed.¹²

Conclusion

MISD's application for modification of KMIH's construction permit, from Class D to Class A status, violates FCC rules and is glaringly at odds with Commission precedent, both generally and with respect to the unique circumstances of its own permit. The application violates FCC contour overlap rules and fails to request the necessary waivers. Moreover, it requests a conversion from secondary Class D to primary Class A status that is unavailable under FCC precedent. Most alarmingly, the KMIH application seemingly thumbs its nose at the Commission's leniency and the University's accommodation in allowing the authorization of a secondary Class D station's contour overlap, by attempting to bootstrap its way to Class A status with the same prohibited overlap. The Commission therefore must deny the KMIH minor modification of permit application.

¹² 47 C.F.R. § 73.3566.

Respectfully submitted,

PACIFIC LUTHERAN UNIVERSITY, INC.

By: Barry Persh
Margaret L. Miller
Barry S. Persh

Its Counsel

Dow Lohnes PLLC
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February 4, 2008

EXHIBIT A
Engineering Statement

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**January 2008
Engineering Statement
Review of KMIH 205A Mercer Island, WA
Application BMPED-20071228ABS**

This Engineering Statement has been prepared on behalf of Pacific Lutheran University, Inc. ("PLU"), licensee of FM station KPLU-FM, which operates on Channel 203C at Tacoma, Washington. PLU has requested that Hatfield & Dawson provide an engineering review of the application (FCC File No. BMPED-20071228ABS) filed by Mercer Island School District #400 ("Mercer Island") to convert its Class D secondary station KMIH Mercer Island to Class A status.

KMIH is currently licensed on Channel 283D, but holds a construction permit BPED-20060327AIM for operation on Channel 205D. As of this writing, a review of the Commission's Consolidated Database System ("CDBS") indicates that no license application has been filed for the Channel 205D operation.

In BMPED-20071228ABS, Mercer Island has requested authority to operate KMIH on Channel 205A, with the same technical facilities authorized by BPED-20060327AIM, specifically with 30 Watts ERP at 69 meters HAAT from a tower on the Mercer Island High School campus.

As depicted on the attached map exhibit, operation of KMIH on Channel 205A with the requested facilities will result in prohibited contour overlap caused to second-adjacent-channel station KPLU-FM 203C Tacoma as well as to third-adjacent-channel station KNHC 208C1 Seattle, in violation of §73.509 of the Commission's Rules. Without explicitly referring to or even mentioning KPLU-FM and KNHC by name, Mercer Island attempts to avail itself of §73.509(d) of the Commission's Rules, which provides that areas of existing otherwise-prohibited overlap can be maintained in a

modification application if the area of overlap is not increased. Mercer Island's application of §73.509(d) is at best premature, however, since KMIH has not commenced operation on Channel 205D. Thus there is no "existing" overlap with KPLU-FM and KNHC which might be shifted from Class D to Class A status.

In light of the fact that there is no existing overlap caused by KMIH to either KPLU-FM or KNHC, it would seem more appropriate for Mercer Island to request a waiver of §73.509 to allow the creation of new overlap caused to those stations, but a review of BMPED-20071228ABS indicates that Mercer Island has not requested any such waiver. An applicant seeking a waiver faces a high hurdle and must plead with particularity the facts and circumstances that warrant a waiver,¹ but Mercer Island has presented no such information.

Presumably, such a waiver request might indicate why KMIH cannot simply implement its authorized operation on Channel 205D, *with technical facilities no different from those proposed in BMPED-20071228ABS*. But Mercer Island has not indicated that operation on Channel 205D is technically unviable, nor that operation on Channel 205A will provide enhanced service to the public or convey any greater public interest benefits.

Neither are we aware of any precedent or policy which would support such a waiver request to create new areas of prohibited overlap to another station. *Educational Information Corp.*, 13 FCC Rcd 23746 (1998) and 6 FCC Rcd 2007 (1991), is inapposite, as that case only allowed the creation of overlap received from another existing station, not the creation of overlap caused to another existing station.

Prohibited Overlap With BNPED-20071012ATS

In addition, Mercer Island's application creates prohibited contour overlap with the prior-filed application BNPED-20071012ATS, for a new NCE FM station on Channel 206C1 at Skykomish,

¹ *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969), *aff'd*, 459 F.2d 1203 (D.C. Cir. 1972), cert. denied, 409 U.S. 1027 (1972) (citing *Rio Grande Family Radio Fellowship, Inc. v. FCC*, 406 F.2d 664 (D.C. Cir. 1968)); *Birach Broadcasting Corporation, Memorandum Opinion and Order*, 18 FCC Rcd 1414, 1415 ¶ 6 (2003).

Washington, filed by Way-FM Media Group, Inc. during the October 2007 filing window for new NCE FM stations. The Skykomish application is on the first-adjacent channel to KMIH, and the Skykomish 54 dBu F(50,10) contour overlaps more than half of the KMIH 60 dBu F(50,50) contour.

This defect is acknowledged by Mercer Island in its application, followed up with a conclusion that "a study based upon an allowable alternate method of calculation shows no overlap."² A study attached at Exhibit 16 of the application presents a study of the Skykomish 54 dBu contour using both the Longley-Rice and PTP methodologies.

To the best of our knowledge, neither Longley-Rice nor PTP has ever been considered "an allowable alternate method of calculation" to demonstrate the lack of prohibited contour overlap between NCE FM facilities: "[T]he Commission does not accept supplemental terrain analyses to determine predicted interference between FM stations."³ Indeed, any formal application of the PTP method has been shelved by the Commission since 2000: "[C]ommenters have identified several issues regarding the Point-to-Point ("PTP") terrain-dependent signal propagation methodology proposed in the Notice that require further inquiry. We intend to seek additional comments regarding possible improvements in the proposed PTP methodology. . ."⁴

We are not aware of any cases where alternative methods have been accepted to satisfy §73.509 requirements. Neither has Mercer Island requested a waiver of §73.509 to allow the consideration of alternative methods in this particular case. Therefore, the KMIH application cannot even be considered for grant prior to disposition of the Skykomish application.

² See Exhibit 16 of BMPED-20071228ABS.

³ *1998 Biennial Regulatory Review – Streamlining of Radio Technical Rules in Parts 73 and 74 of the Commission's Rules, Notice of Proposed Rulemaking*, MM Docket No. 98-93, 13 FCC Rcd 14849 (1998) at Para 30.

⁴ *1998 Biennial Regulatory Review – Streamlining of Radio Technical Rules in Parts 73 and 74 of the Commission's Rules, Second Report and Order*, MM Docket No. 98-93, 65 FR 79773 (2000) at Para 2.

Statement of Engineer

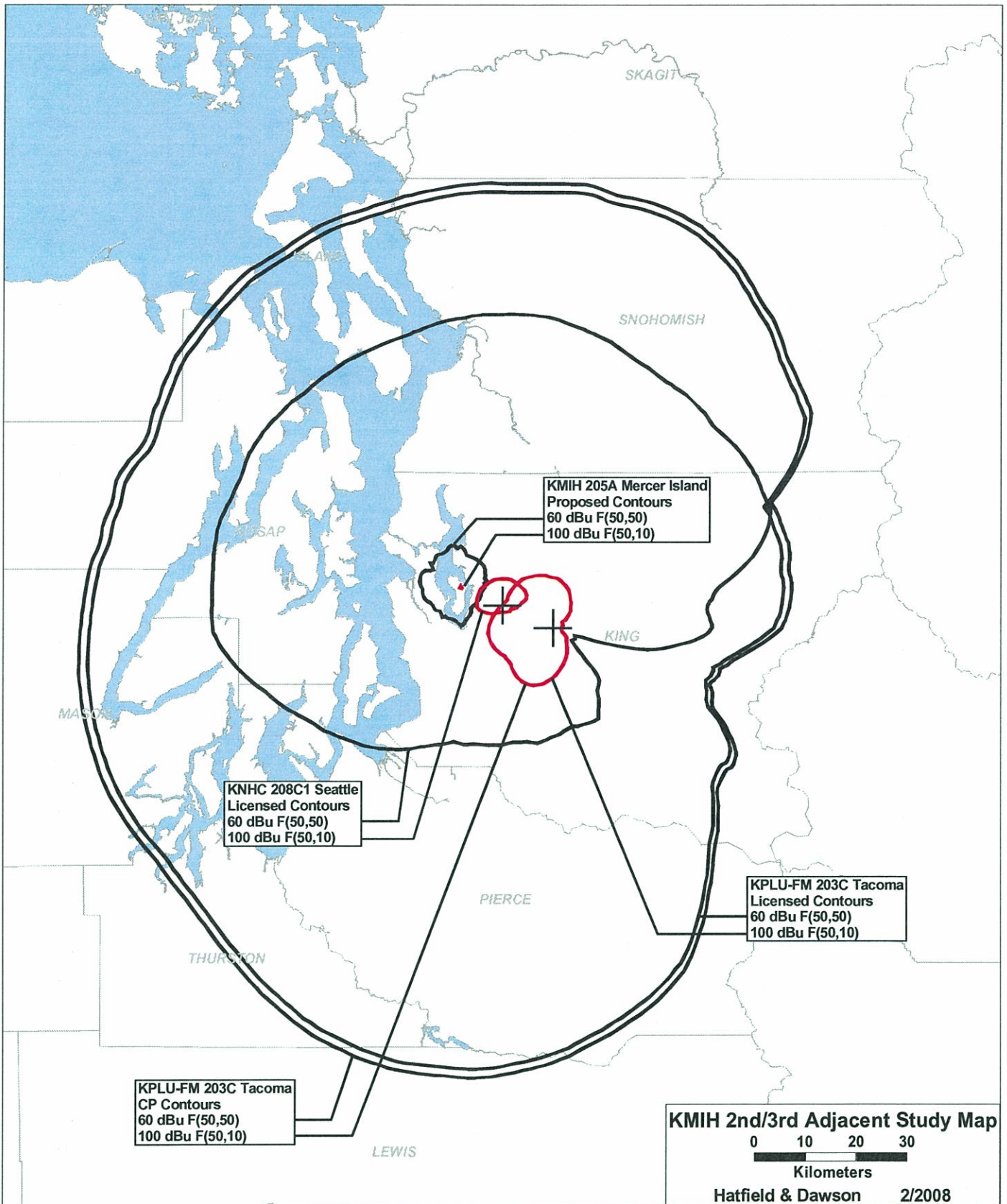
This Engineering Statement has been prepared by Erik C. Swanson under my direct supervision. I hereby declare that the facts set out in the foregoing Engineering Statement, except those of which official notice may be taken, are true and correct.

Signed this 1st day of February, 2008



Benjamin F. Dawson III, P.E.

Erik C. Swanson



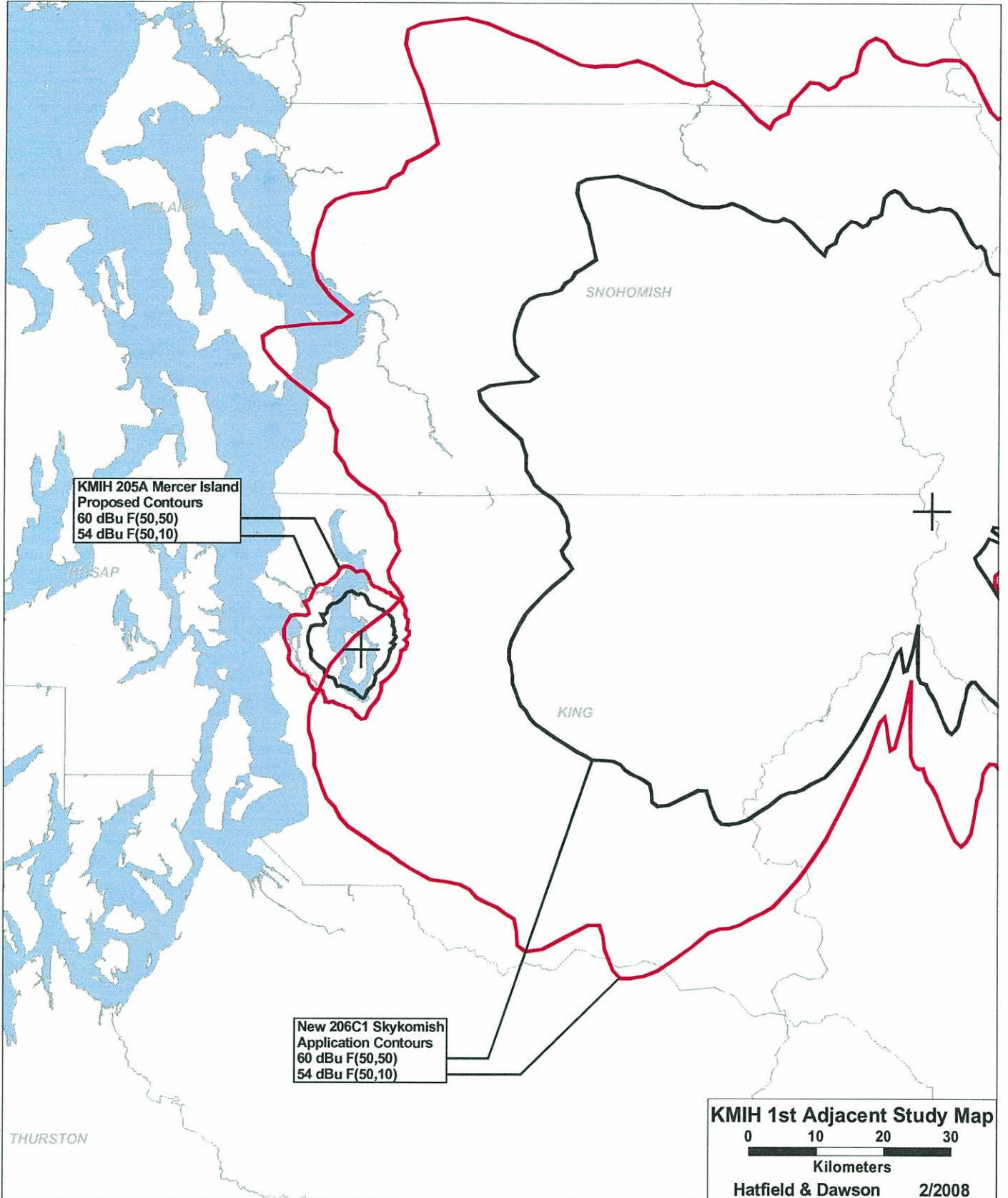


EXHIBIT B

Copy of Pacific Lutheran University Response to Order to Show Cause
Including Copy of Order to Show Cause

STAMP & RETURN

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In re:)
)
KPLU-FM, Tacoma, Washington)
Facility I.D. No. 51199)

Reference 1800B3-RP1

RECEIVED

JUN 29 2006

To: Office of the Secretary
Attn: Audio Division
Media Bureau

Federal Communications Commission
Office of Secretary

STATEMENT IN RESPONSE TO ORDER TO SHOW CAUSE

Pacific Lutheran University ("PLU"), licensee of noncommercial educational station KPLU-FM, Tacoma, Washington, by its counsel, hereby responds to the Order to Show Cause issued on May 23, 2006 (the "Order"),¹ directing PLU to show cause why the KPLU-FM license should not be modified so as to permit the Commission to grant an application by Mercer Island School District #400 to specify operation of Class D station KMIH(FM), Mercer Island, Washington, on Channel 205D in lieu of Channel 283D.

Based on the very limited predicted interference to KPLU-FM from KMIH operating as proposed on Channel 205D, and as an accommodation by one educator to another, PLU does not object to the grant of the KMIH application (File No. BPED-20060327AIM).

However, PLU does object to any modification of the KPLU-FM license that would compromise in any manner its right to be protected fully against any *actual* interference that may be caused by KMIH to KPLU-FM listeners, or that would infringe on PLU's right to implement the construction permit it currently holds for KPLU-FM (File No. BPED-20060109ABR) which might be anticipated to cause greater interference to KMIH, or that would prevent PLU from

making future changes in KPLU-FM's facilities otherwise permitted by FCC rules because of any possible adverse impact on KMIH.

KMIH, as a Class D station, has "secondary" status, and the order to show cause procedure cannot and should not be used to bootstrap the station into a primary status. As a secondary station, KMIH is not permitted to cause any interference to KPLU-FM, and it is required to accept any interference from KPLU-FM, now or in the future.²

While the Commission has been willing to accommodate the needs of Class D stations, and PLU has no general quarrel with the Commission's leniency, since 1978 the FCC has also consistently reaffirmed that Class D stations are secondary stations that must yield to the needs of primary stations such as KPLU-FM. This is true even in cases involving the forced displacement of Class D stations. For example, in one case, the FCC granted a proposal to change the channel designation and community of license of a primary station even though the change would force two Class D stations off the air, stating that although the Commission was "sympathetic to the concerns" of the Class D stations, "the rules applying to secondary stations ... are very clear that a secondary station must give way if it causes actual interference to a primary station," and that "[t]he integrity of the FM Table of Allotments depends on strict adherence to these standards."³ Similarly, the Commission granted a proposal for a new primary station FM allotment even though the allotment would force a neighboring Class D station to either relocate to another channel or cease operation.⁴ Consistency in the treatment of Class D stations in this case requires the Commission to confirm that KMIH remains a secondary service

¹ A copy of the Order to Show Cause is included as Exhibit 1.

² See *In the Matter of Changes in the Rules Relating to Noncommercial Educational FM Broadcast Stations*, Second Report and Order, 69 F.C.C.2d 240, 249 (1978).

³ *In the Matter of Amendment of Section 73.202(b), FM Table of Allotments, FM Broadcast Stations (Bridgeton and Pennsauken, New Jersey)*, 18 FCC Rcd 12192, 12193 (2003).

that will be subject to new allotment proposals or modifications proposed by primary stations in the Seattle market, including any future changes proposed by KPLU-FM.

In addition, in the event there is actual interference from KMIH to the reception of KPLU-FM, the FCC must make clear that KMIH is obliged to resolve such interference or go off the air. This is not a merely theoretical issue. As reflected in the attached Engineering Statement of Hatfield & Dawson, Consulting Electrical Engineers, based on more realistic engineering assumptions than the FCC's usual contour overlap analysis, and taking terrain into account, the proposed KMIH facility can be expected to cause interference to 165 persons who currently receive service from KPLU-FM.⁵ Given that the nature of second-adjacent interference that might arise here would likely result from relatively poor reception characteristics of particular radio receivers, the FCC should make clear that KMIH's obligation extends to replacing receivers experiencing interference with new ones having better second-adjacent channel filtering capabilities. But just so that there is no question, it needs to be clear that KMIH be required immediately to address any complaint of interference, or go off the air until the matter is resolved.

Respectfully submitted,

PACIFIC LUTHERAN UNIVERSITY

By: Todd D. Gray
Todd D. Gray
Margaret L. Miller
Barry Persh

Its Counsel

⁴ *In the Matter of Amendment of Section 73.202(b), FM Table of Allotments, FM Broadcast Stations (Brighton, New York)*, 8 FCC Rcd 793 (1993).

⁵ PLU currently holds a CP to make changes in the KPLU-FM facilities which, when completed, will result in greater signal strength over the service area of KMIH. The number of people that would be interfered with following such changes would be 42.

DOW LOHNES PLLC
1200 New Hampshire Avenue, NW, Suite 800
Washington, D.C. 20036
(202) 776-2571

June 29, 2006

EXHIBIT 1

COPY OF ORDER TO SHOW CAUSE
DATED MAY 23, 2006



Federal Communications Commission
Washington, D.C. 20554

May 25, 2006 ♦

In Reply Refer To:
1800B3-RDH
Released: May 23, 2006

CERTIFIED MAIL – RETURN RECEIPT REQUESTED

Todd D. Gray, Esq.
Dow, Lohnes and Albertson, PLLC
1200 New Hampshire Avenue, N.W.
Washington, D.C. 20036-6802

Re: KPLU-FM, Tacoma, Washington
Facility ID: 51199

Dear Mr. Gray:

This *Order to Show Cause* is directed to Pacific Lutheran University, Inc. (“PLU”), the licensee of non-commercial educational Station KPLU-FM, Tacoma, Washington.¹ KPLU-FM is licensed to operate on Channel 203.

In 2004, the Media Bureau released a *Report and Order* which involved 24 FM channel allotments for radio stations in Oregon and Washington.² One of the actions in that case was to modify the license of Station KMCQ(FM) from Channel 283C3 at The Dalles, Oregon, to Channel 283C3 at Covington, Washington. Implementation of that reallocation could possibly require Class D FM Station KMIH(FM), Mercer Island, Washington, which is licensed to operate on Channel 283D, to cease operations. Mercer Island School District #400 (“Mercer Island S.D.”), the licensee of KMIH(FM), has sought reconsideration of the *Covington Report and Order*.

On March 27, 2006, several parties to the FM allotment proceeding filed a “Joint Request for Approval of Settlement Agreement” (“Joint Request”). The Joint Request proposed, among other things, the dismissal of the Mercer Island S.D. Petition for Reconsideration and the grant of a Mercer Island S.D. minor change application to specify operations on Channel 205D in lieu of Channel 283D. Pursuant to that Joint Request, Mercer Island S.D. filed the Channel 205D application simultaneously with the Joint Request.³

¹ Facility Identification Number 51199.

² *Arlington, The Dalles, Moro, Fossil, Astoria, Gladstone, Portland, Tillamook, Springfield-Eugene, Coos Bay, Manzanita and Hermiston, Oregon, and Covington, Trout Lake, Shoreline, Bellingham, Forks, Hoquiam, Aberdeen, Walla Walla, Kent, College Place, Long Beach and Ilwaco, Washington*, Report and Order, 19 FCC Rcd 12803 (2004)(the “*Covington Report and Order*”).

³ BPED-20060327AIM.

Grant of the Mercer Island S.D. application would result in KMIH(FM) causing second adjacent channel interference to KPLU-FM, Tacoma, Washington. Accordingly, grant of the Mercer Island S.D. application would constitute a modification of the KPLU-FM license.⁴

Section 316(a) of the Communications Act of 1934, as amended (the "Act")⁵ permits the Commission to modify any station license if such action is in the public interest. The Act requires that we notify the affected station in writing of the proposed action, identify the public interest reasons for the proposed action, and afford the station at least thirty days to respond.⁶ The staff has determined that interference to KPLU-FM is predicted to occur only within ten meters of the KMIH(FM) transmitter site.⁷ We find that the Joint Request, which would permit continued operations of KMIH(FM), has sufficient public interest benefits to justify the issuance of a show cause order. Accordingly, we are issuing this *Order* directed to PLU, to show cause why the KPLU-FM license should not be modified as proposed herein.

Accordingly, IT IS ORDERED, That Pacific Lutheran University, Inc., SHALL SHOW CAUSE why its license should not be modified by grant of the subject KMIH(FM) application. Pursuant to Section 1.87 of the Commission's rules, PLU may, no later than June 30, 2006, file a written statement showing with particularity why its license should not be modified as proposed in this *Order*. The Commission may call upon PLU to furnish additional information. If PLU raises any substantial and material questions of fact, a hearing may be required to resolve such questions of fact pursuant to Section 1.87 of the rules. Upon review of the statements and/or additional information furnished, the Commission may grant the modification, deny the modification, or set the matter of modification for hearing.

The PLU submission must be filed in paper form in triplicate with the Office of the Secretary, Federal Communications Commission, 445 12th Street, S.W., Washington, DC 20554.⁸ If PLU files no such statement, we will deem it to have waived its right to protest the modification and to have consented to the modification of the KPLU-FM license by the grant of the KMIH(FM) modification application.⁹

IT IS FURTHER ORDERED That a copy of this *Order to Show Cause* shall be sent by Certified Mail - Return Receipt Requested to:

Pacific Lutheran University, Inc.
121st and Park Avenue
Tacoma, Washington 98447

⁴ See also *R&S Media*, Memorandum Opinion and Order and Order to Show Cause, 19 FCC Rcd 6300, 6306 (2004).

⁵ 47 U.S.C. § 316(a).

⁶ See also 47 C.F.R. § 1.87.

⁷ KPLU-FM's signal strength at the KMIH(FM) transmitter site is 92 dBu.

⁸ Courtesy copies may be served on Roger Holberg and Peter H. Doyle of the Audio Division, Media Bureau.

⁹ See *Pacific Gas and Electric Company*, 17 FCC Rcd 98, 101-102 (W.T. Bur. 2001).

Howard J. Barr, Esq.
Womble Carlyle Sandridge & Rice, PLLC
Seventh Floor
1401 Eye Street, NW
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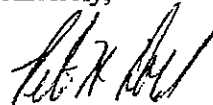
J. Dominic Monahan, Esq.
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and

Mark N. Lipp, Esq.
Vinson & Elkins, LLP
1455 Pennsylvania Avenue, NW
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Washington, D.C. 20004

For additional information, please contact Roger Holberg or Peter H. Doyle of the Audio Division, Media Bureau.

Sincerely,



Peter H. Doyle
Chief, Audio Division
Media Bureau

EXHIBIT 2

ENGINEERING STATEMENT OF
HATFIELD & DAWSON

HATFIELD & DAWSON

JAMES B. HATFIELD, PE
BENJAMIN F. DAWSON III, PE
THOMAS M. ECKELS, PE
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**Engineering Statement
Interference Study for KMIH Application
Into KPLU-FM
June 2006**

This Engineering Statement has been prepared on behalf of Pacific Lutheran University, licensee of station KPLU-FM, which operates on FM Channel 203C at Tacoma, Washington.

In an application BPED-20060327AIM, Mercer Island School District #400 has proposed to modify its station KMIH from Channel 283D to Channel 205D. This will bring KMIH for the first time onto a second-adjacent channel to KPLU-FM, with a transmitter site within the KPLU-FM 60 dBu protected contour.

Per the request of the KPLU-FM licensee, a Longley-Rice analysis has been conducted of the predicted impact which the proposed operation of KMIH will have upon reception of KPLU-FM. This study was made using the Longley-Rice v1.2.2 code as implemented in the SIGNAL™ software package from EDX Wireless, LLC. Terrain was extracted from the 3-second terrain database at 0.1 km increments along radials spaced 0.5 degrees apart. The KPLU-FM desired signal was calculated for 50% time and 50% location variability, while the interfering KMIH signal was calculated for 10% time and 50% location variability. Study was made using both the licensed and authorized KPLU-FM facilities.

The results of this analysis are depicted on the attached map exhibits, plotted as a grid with cells of 0.2 km on each side. Green shading indicates areas where the KPLU-FM facility studied is predicted to have 60+ dBu service free of interference from KMIH. Red shading indicates areas where KPLU-FM is predicted to have 60+ dBu service, but with interference from KMIH. The D/U ratio used for these studies was -20 dB, as corresponding to §73.509(b) of the Rules.

When compared with 2000 Census block centroid data, this study indicates that the proposed KMIH facility is predicted to cause interference to 165 persons who presently receive service from the KPLU-FM license, and to 42 persons who would receive service from the KPLU-FM construction permit facility.

June 8, 2006



Erik C. Swanson
Technical Consultant

SIGNAL™: KMIH into KPLU

Prop. model 1: Longley-Rice v1.2.2
Time: 50.0% Loc.: 50.0%
Prediction Confidence Margin: 0.0dB
Climate: Continental Temperate
Land use (clutter): none
Atmospheric Abs.: none
K Factor: 1.333

Prop. model 2: Longley-Rice v1.2.2
Time: 10.0% Loc.: 50.0%
Prediction Confidence Margin: 0.0dB
Climate: Continental Temperate
Land use (clutter): none
Atmospheric Abs.: none
K Factor: 1.333

Sites

Site: kmih
N47°34'21.00" W122°13'05.00" 101.0 m
kmih * Tx.Ht.AGL: 30.0 m Total ERPd: -15.23 dBkW
Model: 2 omni-horizontal/0.0° 88.9000 MHz

Site: kplu
N47°30'14.00" W121°58'29.00" 899.0 m
kplu Tx.Ht.AGL: 41.0 m Total ERPd: 17.63 dBkW
Model: 1 directional-horizontal/0.0° 88.5000 MHz

C/I ratio Primary Group TXs to Second Group TXs

> -20.0 dB Int-Free
< -20.0 dB Interference
Display threshold level: -54.0 dBmW
RX Antenna - Type: OMNI
Height: 9.1 m AGL Gain: 0.00 dBd

KILOMETERS



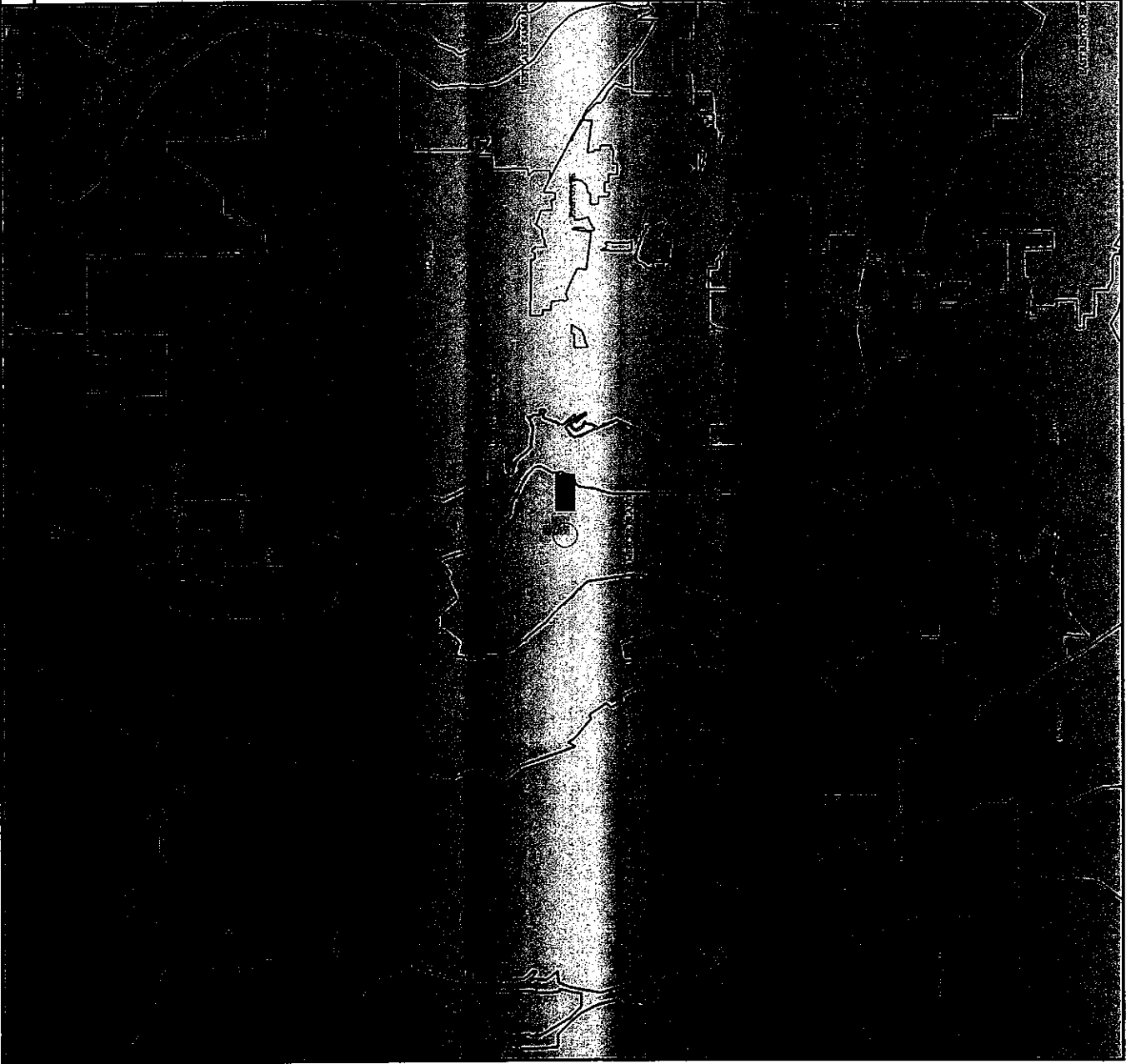
KMIH App Into KPLU Lic

Hatfield & Dawson

June 2006

PLU

Longley-Rice Interference Population
-20 dB D/U ratio: 165



SIGNAL™: KMIH into KPLU

Prop. model 1: Longley-Rice v1.2.2
Time: 50.0% Loc.: 50.0%
Prediction Confidence Margin: 0.0dB
Climate: Continental Temperate
Land use (clutter): none
Atmospheric Abs.: none
K Factor: 1.333

Prop. model 2: Longley-Rice v1.2.2
Time: 10.0% Loc.: 50.0%
Prediction Confidence Margin: 0.0dB
Climate: Continental Temperate
Land use (clutter): none
Atmospheric Abs.: none
K Factor: 1.333

Sites

Site: kmih
N47°34'21.00" W122°13'05.00" 101.0 m
kmih * Tx.Ht.AGL: 30.0 m Total ERPd: -15.23 dBKW
Model: 2 omni-horizontal/0.0° 88.9000 MHz

Site: kplu
N47°30'14.00" W121°58'29.00" 899.0 m
kplu Tx.Ht.AGL: 41.0 m Total ERPd: 18.33 dBKW
Model: 1 directional-horizontal/0.0° 88.5000 MHz

C/I ratio Primary Group TXs to Second Group TXs

> -20.0 dB Int-Free
< -20.0 dB Interference
Display threshold level: -54.0 dBmW
RX Antenna - Type: OMNI
Height: 9.1 m AGL Gain: 0.00 dBd

KILOMETERS



KMIH App Into KPLU CP

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PLU

June 2006

Longley-Rice Interference Population

-20 dB D/U ratio: 42

CERTIFICATE OF SERVICE

I, Nadine Curtis, a secretary at Dow Lohnes PLLC, hereby certify that on this 29th day of June, 2006, I have caused a copy of the foregoing "Statement in Response to Order to Show Cause" to be delivered via U.S. first-class mail, postage prepaid, to the following:

Howard J. Barr, Esq.
Womble Carlyle Sandridge & Rice, PLLC
Seventh Floor
1401 Eye Street
Washington, D.C. 20005

J. Dominic Monahan
Luvaas Cobb Richards & Fraser, PC
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Eugene, OR 97401

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Washington, D.C. 20004

Peter H. Doyle
Chief, Audio Division
Media Bureau
Federal Communications Commission
Washington, D.C. 20554

Roger D. Holberg
Audio Division
Media Bureau
Federal Communications Commission
Washington, D.C. 20554



EXHIBIT C
July 2006 Emails

From: Barr, Howard [mailto:HBarr@wcsr.com]
Sent: Wednesday, July 12, 2006 3:17 PM
To: Peter Doyle
Cc: Roger Holberg; Gray, Todd; wrichardson@wilmer.com
Subject: RE: Responses to the Orders to Show Cause

Peter -- It was not my intent to be disingenuous. Yes. The client agrees to such a condition.

H

-----Original Message-----

From: Peter Doyle [mailto:Peter.Doyle@fcc.gov]
Sent: Wednesday, July 12, 2006 2:50 PM
To: Barr, Howard
Cc: Roger Holberg; tgray@dlalaw.com; wrichardson@wilmer.com
Subject: RE: Responses to the Orders to Show Cause

Howard -- Either your client agrees to the condition to cure ACTUAL interference or it does not. To suggest that there is no impediment to the grant of the applications when you are unwilling to clearly state that your client agrees to this condition is disingenuous.

I am hoping that we will be able to release a decision in August.

*** Non-Public: For Internal Use Only ***

-----Original Message-----

From: Barr, Howard [mailto:HBarr@wcsr.com]
Sent: Wednesday, July 12, 2006 1:51 PM
To: Peter Doyle
Cc: Roger Holberg; tgray@dlalaw.com; wrichardson@wilmer.com
Subject: RE: Responses to the Orders to Show Cause

Peter -- What we see as being important here is that the parties do not object to the grant of the application and therefore Mercer Island does not take issue with the responses. The only point I might raise is that the study accompanying the KPLU and KEXP responses only considers the proposals using a -20 dB D/U ratio. The KMIH and KASB proposals make the case for application of a -40dB D/U ratio as the more appropriate standard and that, based on that standard, neither KASB nor KMIH will cause any interference at ground level, and thus no interference to any populated areas.

H

-----Original Message-----

From: Peter Doyle [mailto:Peter.Doyle@fcc.gov]
Sent: Thursday, July 06, 2006 4:58 PM
To: Barr, Howard
Cc: Roger Holberg; tgray@dlalaw.com; wrichardson@wilmer.com
Subject: RE: Responses to the Orders to Show Cause

Howard,

I infer from your email that KMIH agrees to the conditions requested by PLU and Seattle Public Schools. Please confirm.

Peter

*** Non-Public: For Internal Use Only ***

-----Original Message-----

From: Barr, Howard [mailto:HBarr@wcsr.com]

Sent: Thursday, July 06, 2006 4:43 PM

To: Peter Doyle

Cc: Roger Holberg; tgray@dlalaw.com; wrichardson@wilmer.com

Subject: Responses to the Orders to Show Cause

Peter -- We wanted to make certain you were aware that Seattle Public Schools, Pacific Lutheran University and the University of Washington have each submitted their responses to the Orders to Show Cause in the Mercer Island matter. Copies of their responses are attached. As we read the responses, the parties do not object to the proposed KMIH/KASB grants, agree that any overlap is minimal and that the applications can be granted consistent with Commission policy.

Given our reading of these submissions, it is our view that there are no impediments to the grant of the proposed applications and approval of the settlement agreement as contemplated by the parties.

Please call me if you have any questions.

H

Howard J. Barr, Esq.
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EXHIBIT D

KMIH Class D Construction Permit
FCC File No. BMPED-20071228ABS

United States of America
FEDERAL COMMUNICATIONS COMMISSION
FM BROADCAST STATION CONSTRUCTION PERMIT

Authorizing Official:

Official Mailing Address:

MERCER ISLAND SCHOOL DISTRICT # 400
9100 SE 42ND ST
MERCER ISLAND WA 98040

James D. Bradshaw
Deputy Chief
Audio Division
Media Bureau

Facility ID: 41205

Grant Date: September 20, 2006

Call Sign: KMIH

This permit expires 3:00 a.m.
local time, September 20, 2009.

Permit File Number: BPED-20060327AIM

Subject to the provisions of the Communications Act of 1934, as amended, subsequent acts and treaties, and all regulations heretofore or hereafter made by this Commission, and further subject to the conditions set forth in this permit, the permittee is hereby authorized to construct the radio transmitting apparatus herein described. Installation and adjustment of equipment not specifically set forth herein shall be in accordance with representations contained in the permittee's application for construction permit except for such modifications as are presently permitted, without application, by the Commission's Rules.

Commission rules which became effective on February 16, 1999, have a bearing on this construction permit. See Report & Order, Streamlining of Mass Media Applications, MM Docket No. 98-43, 13 FCC RCD 23056, Para. 77-90 (November 25, 1998); 63 Fed. Reg. 70039 (December 18, 1998). Pursuant to these rules, this construction permit will be subject to automatic forfeiture unless construction is complete and an application for license to cover is filed prior to expiration. See Section 73.3598.

Equipment and program tests shall be conducted only pursuant to Sections 73.1610 and 73.1620 of the Commission's Rules.

Name of Permittee: MERCER ISLAND SCHOOL DISTRICT # 400

Station Location: WA-MERCER ISLAND

Frequency (MHz): 88.9

Channel: 205

Class: D

Hours of Operation: Unlimited

Callsign: KMIH

Permit No.: BPED-20060327AIM

Transmitter: Type Accepted. See Sections 73.1660, 73.1665 and 73.1670 of the Commission's Rules.

Transmitter output power: As required to achieve authorized ERP.

Antenna type: Non-Directional

Antenna Coordinates: North Latitude: 47 deg 34 min 21 sec

West Longitude: 122 deg 13 min 05 sec

	Horizontally Polarized Antenna	Vertically Polarized Antenna
Effective radiated power in the Horizontal Plane (kW):	.0300	.0300
Height of radiation center above ground (Meters):	30	30
Height of radiation center above mean sea level (Meters):	131	131
Height of radiation center above average terrain (Meters):	69	69
Antenna structure registration number: Not Required		
Overall height of antenna structure above ground: 40 Meters		

Obstruction marking and lighting specifications for antenna structure:

It is to be expressly understood that the issuance of these specifications is in no way to be considered as precluding additional or modified marking or lighting as may hereafter be required under the provisions of Section 303(q) of the Communications Act of 1934, as amended.

None Required

Special operating conditions or restrictions:

- 1 The permittee/licensee in coordination with other users of the site must reduce power or cease operation as necessary to protect persons having access to the site, tower or antenna from radiofrequency electromagnetic fields in excess of FCC guidelines.
- 2 This construction permit is for a Class D secondary station.
- 3 Future modifications of KPLU-FM, Facility ID No. 51199, will not constitute a "per se" modification of KMIH's license. See "Educational Information Corporation (WCPE)", 6 FCC Rcd 2207 (1991).

Callsign: KMIH

Permit No.: BPED-20060327AIM

Special operating conditions or restrictions:

- 4 Future modifications of KNHC (FM), Facility ID No. 59526, will not constitute a "per se" modification of KMIH's license. See "Educational Information Corporation (WCPE)", 6 FCC Rcd 2207 (1991).

- 5 Pursuant to the staff's letter dated September 20, 2006, KMIH must promptly eliminate any interference caused to KPLU-FM or KNHC (FM) using the facilities authorized by this construction permit. In the event that such interference cannot be resolved promptly by the use of suitable techniques, KMIH may be required by the Commission to cease operations.

*** END OF AUTHORIZATION ***

CERTIFICATE OF SERVICE

I, Sue Fischer, a secretary at Dow Lohnes, hereby certify that a true copy of the foregoing Petition to Deny was sent via first class mail or hand delivery this 4th day of February, 2008 to the following:

John Garziglia
Womble, Carlyle, Sandridge & Rice
1401 Eye Street, NW
Washington, DC 20005
Counsel for Mercer Island School District #400

William R. Richardson, Jr.
Wilmer Cutler Pickering Hale and Dorr LLP
1875 Pennsylvania Ave., NW
Washington, DC 20006
Counsel for Seattle Public Schools / KNHC(FM)

James Bradshaw*
Deputy Division Chief, Audio Division, Media Bureau
Federal Communications Commission
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Washington, D.C. 20554

Peter H. Doyle*
Division Chief, Audio Division, Media Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554



Sue Fischer

* via hand delivery