

File

41205

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington D.C. 20554

FILED/ACCEPTED
FEB - 6 2008
Federal Communications Commission
Office of the Secretary

In re Application of
Mercer Island School District #400

For a
Minor Modification of the Construction Permit
For
KMIH, Mercer Island, WA

File No.
BMPED - 20071228ABS

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

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AUDIO DIVISION

Informal Objection

Pursuant to Section 73.3587 of the Commission's Rules, 47 CFR § 73.3587, Seattle Public Schools, licensee of KNHC(FM), Seattle, WA (Facility ID No. 59526), by counsel, hereby objects to the above-referenced Application for a Minor Modification of the Construction Permit for KMIH(FM), Mercer Island, WA (Facility ID No. 41205) filed by the Mercer Island School District #400 ("Mercer Island SD") on December 28, 2007. This application to change KMIH(FM)'s service classification from Class D to Class A should be rejected because Mercer Island SD is attempting to circumvent the conditions placed on it by the Media Bureau as part of its decision to grant Mercer Island SD's 2006 application to modify KMIH(FM)'s construction permit and its corresponding request for a limited waiver of 47 CFR § 73.509(b). Moreover, the requested change in service class should be denied because it is not necessary to facilitate KMIH(FM)'s continuing operations and the only reasons for the proposed change would be

inconsistent with the conditions on KMIH(FM)'s construction permit, and thus is not in the public interest.

Background

In March 2006, Mercer Island SD filed an application for a minor change to its construction permit seeking permission for KMIH(FM) to change its channel of operation, *see* File No. BPED – 20060327AIM (the “2006 application”). Because grant of this application would cause third adjacent channel interference to KNHC(FM) – and second channel adjacent interference to KPLU-FM, Tacoma, WA, whose license is held by Pacific Lutheran University – Mercer Island SD sought a limited waiver of Section 73.509(b) of the Commission’s Rules. Recognizing that a grant of the application would modify KNHC(FM)’s and KPLU-FM’s licenses, the Media Bureau issued an Order to Seattle Public Schools and Pacific Lutheran University, requiring them to show cause why the Commission should not grant the application and the corresponding request for waiver of the Commission’s Rules.^{1/}

Seattle Public Schools responded to the Order to Show Cause stating that, while it did not oppose the proposed modification of KNHC(FM)’s construction permit and Mercer Island SD’s corresponding request for a limited waiver of Section 73.509(b), it “reserves the right to vigorously oppose any future changes to the facilities of KMIH(FM).”^{2/} Seattle Public Schools sought specific conditions on the grant of Mercer Island SD’s application that would protect

^{1/} Order to Show Cause, *Application of Mercer Island School District #400, KMIH(FM), Mercer Island, WA, for Construction Permit for Reserved Channel Noncommercial Educational Broadcast Station and Request for Waiver of Section 73.509(b) of the Commission’s Rules* (May 23, 2006).

^{2/} Seattle Public Schools Reply to Order to Show Cause, *Application of Mercer Island School District #400, KMIH(FM), Mercer Island, WA, for Construction Permit for Reserved Channel Noncommercial Educational Broadcast Station and Request for Waiver of Section 73.509(b) of the Commission’s Rules* (June 30, 2006) (“Seattle Public Schools Reply”).

KNHC(FM) from any additional interference – both as currently licensed and in regards to potential future modifications of its facilities.

In September 2006, the Media Bureau released a letter decision granting Mercer Island SD's application for a change to its operating channel and its request for a limited waiver of Section 73.509(b) of the Commission's rules.^{3/} But, as agreed to by Mercer Island SD,^{4/} the Bureau placed specific conditions on its grant. Specifically, the Bureau imposed the following conditions on KMIH(FM)'s modified construction permit: First, KMIH(FM) is required to "eliminate promptly any interference it causes to stations KPLU-FM and KNHC(FM)," and in the event that such interference cannot be solved in a prompt manner "KMIH(FM) will be required to cease operations."^{5/} Second, Seattle Public Schools and Pacific Lutheran University will not be required "to protect KMIH(FM) in future facility applications."^{6/} Mercer Island SD accepted the grant with the specified conditions. See Section 1.110 of the Commission's Rules, 47 CFR § 1.110.

^{3/} Letter from Peter H. Doyle, Chief, Audio Division, Media Bureau, Order to Show Cause, *Application of Mercer Island School District #400, KMIH(FM), Mercer Island, WA, for Construction Permit for Reserved Channel Noncommercial Educational Broadcast Station and Request for Waiver of Section 73.509(b) of the Commission's Rules* (Sept. 20, 2006) ("Bureau Letter Decision").

^{4/} See Mercer Island School District #400 Response to Reply to Order to Show Cause, *Application of Mercer Island School District #400, KMIH(FM), Mercer Island, WA, for Construction Permit for Reserved Channel Noncommercial Educational Broadcast Station and Request for Waiver of Section 73.509(b) of the Commission's Rules* (Sept. 15, 2006) at 2.

^{5/} Bureau Letter Decision at 2.

^{6/} *Id.* at 3.

The Current Application

Subsequently, on December 28, 2007, Mercer Island SD filed the instant Application for a Minor Modification of the Construction Permit for KMIH(FM), asking that KMIH(FM) be reclassified from a Class D to a Class A FM station. There can be only two reasons why Mercer Island SD wants to change KMIH(FM)'s service class: (1) it seeks the increased interference protections afforded to Class A stations, *see* 47 CFR § 73.509, or (2) it views a change in service class as the first step towards a subsequent change in its facilities that would expand KMIH(FM)'s service area. Either way, the current application, if granted, would have a direct impact on KNHC(FM)'s ability to make future changes to its facilities because a change to Class A status for KMIH(FM) would result in KNHC(FM) having to protect KMIH(FM).

When viewed in this manner, KMIH(FM)'s current application is an attempt by Mercer Island SD to circumvent the conditions the Media Bureau imposed on KMIH(FM) as part of its carefully-crafted grant of its 2006 application. Indeed, while Mercer Island SD does list the 2006 application as evidence that the Commission has previously found Mercer Island SD to be a qualified noncommercial education entity, the application includes no mention of the conditions placed on the grant to KMIH(FM). Quite simply, Mercer Island SD is trying wiggle out of the Bureau's unambiguous decision that KMIH(FM) must maintain its secondary status to KNHC(FM) (and KPLU-FM). The Bureau should reject this attempt to make an end run around its decision.

Additionally, the Commission granted Mercer Island SD's 2006 application and its request for a limited waiver of Section § 509(b) in main part because it would "promote the public interest by allowing KMIH(FM) to continue operations that otherwise would have to be

terminated.”^{7/} As Seattle Public Schools pointed out in its Reply to the Order to Show Cause, the grant of Mercer Island SD’s 2006 application should act to foreclose any additional changes by KMIH(FM) that “would increase the area of interference to KNHC(FM), because KMIH(FM) would no longer be able to demonstrate that such changes are necessary to allow KMIH(FM) to continue to provide service.”^{8/} The current application is exactly the type of “additional change” to which Seattle Public Schools was referring. As explained above, while the current application does not immediately seek to increase the interference KMIH(FM) causes to KNHC(FM), the only reason for filing the current application is if Mercer Island SD intends to either change KMIH(FM)’s facilities to increase its signal coverage or it seeks increased interference protection for KMIH(FM). Any of these actions would increase the interference KNHC(FM) receives and/or prevent it from making future modifications to its facilities. But, in its current application Mercer Island SD does not argue – nor could it – that a change in service class is necessary to allow KMIH(FM) to continue to provide service.

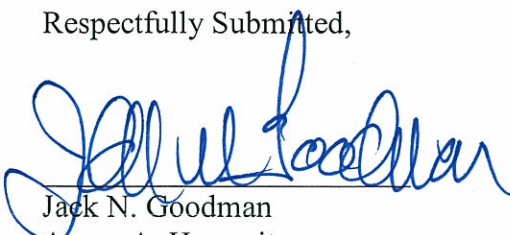
^{7/} *Id.* at 2.

^{8/} *Seattle Public Schools Reply* at 1-2.

Conclusion

For the reasons stated above, Seattle Public Schools respectfully requests that Mercer Island SD's application for a modification of the construction permit for KMIH(FM) be denied.

Respectfully Submitted,



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February 6, 2008

CERTIFICATE OF SERVICE

I, Aaron A. Hurowitz, hereby certify that on this 6th day of February, 2008, I have caused a copy of the foregoing "Informal Objection" to be delivered via first-class mail to the following:

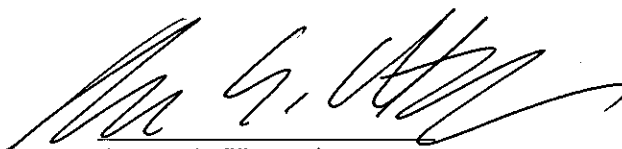
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A handwritten signature in black ink, appearing to read 'A. Hurowitz', with a stylized flourish at the end.

Aaron A. Hurowitz