FEDERAL COMMUNICATIONS COMMISSION

445 12th Street SW
WASHINGTON DC 20554

MEDIA BUREAU
AUDIO DIVISION
APPLICATION STATUS: (202) 418-2730
HOME PAGE: http://www.fcc.gov/mb/audio/

PROCESSING ENGINEER: Dale Bickel
TELEPHONE: (202) 418-2700
FAX: (202)-418-1411 MAIL STOP: 2-B450
INTERNET ADDRESS: dale.bickel@fcc.gov

July 21, 2008
(Corrected 7/22/2008)

Nick De Vogel, General Manager, KMIH (FM)
Mercer Island School District #400
9100 SE 42nd Street
Mercer Island, WA 98040-4107

In re: KMIH (FM), Mercer Island, WA
Mercer Island School District
Facility ID No. 46740
Application BMPED-20071228ABS

Dear Mr. Vogel:

This letter is in reference to the above application for modification of construction permit BMPED-20071228ABS. The modification application proposes to convert the Class D facilities authorized in construction permit BPED-20060327AIM to Class A without technical changes.[1] Informal objections were filed against this application by Pacific Lutheran University, Inc., licensee of KPLU-FM, Tacoma, WA, and by Seattle Public Schools, licensee of KNHC, Seattle, WA.[2]

Application proposal. KMIH's authorized (construction permit) and proposed 60 dBu service area lies wholly within the proposed 40 dBu interfering contour from cochannel application BPED-20071012ATS for a new noncommercial educational station in Skykomish, WA. The Skykomish application was timely filed during the recent NCE application filing window (October 12 -22, 2007) which is now closed. Applications such as KMIH's that are filed after the close of the window period must protect earlier applications filed during the window period. Consequently, KMIH's current proposal creates prohibited contour overlap with protected application BPED-20071012ATS, in violation of Section 73.509.

KMIH's application recognizes this situation, and requests waiver of Section 73.509.[3] In support of the request for

[1] KMIH's grandfathered Class D facilities are 0.030 kW effective radiated power (ERP) at 69 meters antenna height above average terrain (HAAT). With these parameters, KMIH's reference 60 dBu (1 mV/m) contour extends 6.3 km radius. Because the reference distance exceeds 6 km, KMIH believes its facilities can be reclassified to Class A. *See* Sections 73.511(a) and 73.211(a)(3) of the Commission's Rules.

[2] Seattle Public School's pleading was filed as a petition to deny. However, a petition to deny does not lie against a minor modification application. Thus, we are treating this "petition to deny" as an informal objection pursuant to 47 C.F.R. Section 73.3587.

[3] In *Open Media Corporation*, FCC 93-301, 8 FCC Rcd 4070, 4071 (1993), the Commission stated as follows.

> [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 such as ownership or programming 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. [several citations omitted]

Consequently, we have not made KMIH's programming a factor in our evaluation of its Section 73.509 waiver request.

waiver, the applicant contends that a mountain range between KMIH and the Skykomish transmitter site blocks the interfering signal from passing the mountain. KMIH includes an exhibit wherein it is claimed that the Commission has a policy of accepting supplemental showings where the "terrain departs widely" from the average, and so a supplemental showing to demonstrate a lack of interference based on Longley-Rice and point-to-point methods is justified. As no interference is predicted, KMIH believes its application to be acceptable for filing and grantable.

Analysis. We do not agree. In *Certain Minor Changes Without a Construction Permit*, 12 FCC Rcd 12371, 12401-12403 (1997), the Commission stated its policy with respect to supplemental showings pertaining to interference calculations:

> First and foremost, we want to emphasize that supplemental showings have not been accepted, nor will be accepted, for the purpose of demonstrating interference or prohibited contour overlap between FM broadcast stations. ... To employ supplemental showings in this manner would represent a fundamental change as to how contour protection applications are processed, and would require a separate rulemaking proceeding to specify standards, methods and assumptions, and possibly revised definitions for protected service areas and interference.

and that the policy has not changed.[4] There was no compelling justification provided why the longstanding prohibition against using supplemental analyses for predicting interference or contour overlap in the FM radio service should be set aside in this instance.

KMIH's technical exhibit ignores the different contexts inherent in permitting use of supplemental showings for predicting service of the community of license or main studio coverage while denying the use of supplemental showings in predicting interference. Predictions using supplemental showings to demonstrate sufficient coverage of the community (Sections 73.315 and 73.515) or to demonstrate compliance with the main studio rule (Section 73.1125) only affect the single station at issue. Cochannel and adjacent channel stations are not affected by the application of supplemental showings in this manner. However, interference predictions using supplemental showings lead to a completely different result. KMIH's terrain-blocked situation is certainly not unique, as there are literally hundreds of stations with intervening terrain in one direction or more. It is also certain that many more new or changed stations could be authorized using supplemental analyses. However, these new or changed stations would not be adequately protected from interference under our present rules.[5] Moreover, Section 73.509 is the Commission's primary vehicle for ensuring compliance with the fair and equitable distribution of noncommercial educational stations under the Communications Act. It is unclear what impact stations authorized under alternate prediction methodologies would have on this balance. Moreover, different supplemental methods make different assumptions about the effects of intervening terrain and other

---

[4] In MM Docket 98-93, the Commission initiated consideration of the point-to-point propagation method for use in the FM service. However, in the *Second Report and Order* in MM Docket 98-93, 15 Rcd 16149 (2000) at Paragraph 8, the Commission stated that it was likely that "several program modifications" were under consideration that could affect the results obtained from the analysis. As of this time the point-to-point method is still being reviewed.

[5] For example, a licensed noncommercial educational station is entitled to maintain its authorized protected and interfering contours in a given direction. It might be possible for a terrain-blocked station to later move and use a directional antenna atop the intervening terrain obstruction while maintaining its existing interfering contour toward the opposite station. Were such a change to be implemented – a change that would be acceptable under our present rules – the terrain blockage would be removed and the opposite station would suddenly be faced with increased interference and diminished coverage, and without recourse to object. Similarly, an increase in antenna height by either station, even at the existing transmitter site, also affects the calculations over the terrain obstacle and may result in increased interference, yet this change is permissible (with a construction permit) under our rules.

Conversely, were the Skykomish applicant required to protect the new proposed operation for KMIH, it would reduce the Skykomish proposal's range of potential transmitter sites from which it could operate. It would also force the Skykomish applicant to conduct its own supplemental analyses against KMIH for any change it might want to make, such as increasing antenna height. A requirement of this sort is not contemplated by our present rules.

variables and often come up the different results. Simple fairness demands a procedure that all can use to come up with consistent results. These considerations, and more, can only be properly considered in the context of a notice-and-comment rulemaking focused on the FM service. At the present time, there is no rulemaking on the subject likely to produce a workable framework for supplemental showings in the near future.

Indeed, KMIH's proposal here illustrates another facet of demonstrating why supplemental showings should not be accepted piecemeal for the prediction of (or lack of) interference. As a Class D station, KMIH is a secondary station and must accept any interference caused by other, Class A or larger stations. Consequently, with respect to KMIH, the Skykomish applicant is perfectly within his rights to extend a 40 dBu interfering contour over KMIH's 60 dBu service area. However, if KMIH is granted a construction permit as a Class A station, our rules would require that any subsequent amendment or modification of this application protect KMIH under Section 73.509. This could drastically curtail or derail the proposed new service in Skykomish and could feasibly undermine the applicant's standing with respect to competing applications in the same area. We do not find that an acceptable outcome.

Accordingly, KMIH's request for waiver of Section 73.509 IS DENIED, and application BMPED-20071228ABS, being unacceptable for filing, IS DISMISSED. The informal objections of Pacific Lutheran University and Seattle Public Schools ARE ALSO DISMISSED. Please note that we have not performed a complete review on the application which could reveal other deficiencies that could preclude acceptance.

This action has no effect on KMIH's authorized move to Channel 205D under construction permit BPED-20060327AIM. KMIH may commence operations on that channel at such time as it is ready.

Sincerely,

Dale E. Bickel

Dale E. Bickel
Senior Engineer
Audio Division
Media Bureau

cc: Womble, Carlyle, Sandridge and Rice, PLLC
Wilmer Cutler Pichering Hale and Dorr LLP
Dow Lohnes PLLC