

**Federal Communications Commission
Washington, D.C. 20554**

July 7, 2005

**DA 05-1941
In reply refer to:
1800B3-HM**

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Re: KAJC(FM), Salem, OR
Facility ID No. 91565
BMPED-20020308ABM
Petition for Reconsideration

Dear Counsel:

This letter concerns a Petition for Reconsideration filed on July 29, 2002, by CSN International (“CSN”), now licensee of KAJC(FM), which was at that time an unbuilt noncommercial educational (“NCE”) station in Salem, Oregon.¹ On June 24, 2002, the staff dismissed CSN’s application to increase the station’s effective radiated power and to change the directional antenna pattern.² The proposal did not comply with Section 73.515 of our rules, which requires an NCE station to provide coverage at minimum field strength of 1 mV/m (60 dBu) to at least 50 percent of its community of license or reach 50 percent of the population within the community.³ The *Staff Decision* also denied CSN’s request for a waiver of Section 73.515. CSN seeks reconsideration, which we deny for the reasons discussed below.

Background

CSN’s original 1998 application for a new NCE FM station in Salem was filed prior to adoption of Section 73.515 which established minimum community coverage for NCE FM applications. CSN’s application was mutually exclusive with applications filed by Western Baptist College (“WBC”) and Broadcasting for the Challenged, Inc. (“BFTC”). This group of applications was one of many longstanding “closed” groups identified in an NCE rulemaking proceeding.⁴ As CSN observes, such

¹ The station is now built and a license was issued to CSN on March 31, 2005, according to the parameters specified in CSN’s original 1998 application (FCC File No. BPED-19980826ML). See FCC File No. BLED-20050124AHZ.

² See *Letter to Mr. Eric S. Kravetz* (MB June 24, 2002) (“*Staff Decision*”).

³ 47 C.F.R. § 73.515. As noted in the *Staff Decision* (at 1), CSN’s proposed 1 mV/m (60 dBu) contour does not cover any portion of Salem, OR.

⁴ See *Reexamination of the Comparative Standards for Noncommercial Educational Applicants*, 16 FCC Rcd 5074, 5085 n.25 (2001) (“*NCE Order*”) (establishing criteria for comparing NCE applications and granting a waiver of Section 73.515 to “closed” groups, *i.e.*, those groups of mutually exclusive applications (identified in Appendix D

applications were eligible for a waiver of Section 73.515, which had only recently been enacted in the technical streamlining rulemaking proceeding.⁵ CSN, WBC, and BFTC submitted a settlement agreement in accordance with procedures outlined in the *NCE Order*.⁶ On January 25, 2002, the Commission approved the settlement, resulting in grant of construction permits to both CSN and WBC for the community of Salem, Oregon, and dismissal of BFTC's application.⁷ Pursuant to the waiver provision in the *NCE Order*, CSN's permit allowed construction of facilities that did not meet the new Section 73.515 coverage requirement.⁸

On March 8, 2002, CSN applied for a minor modification of the permit. The proposed modification would have brought a portion of CSN's signal closer to Salem, but still would not have resulted in coverage of any part of that community.⁹ As indicated above, the staff dismissed the modification application because it did not provide the requisite coverage of Salem and the staff found no grounds to grant CSN's request for a waiver of Section 73.515. The request was based solely on CSN's assertion that "grandfathering of the application [had been] granted under the provisions of MM Docket 95-31 [the *NCE Order*], footnote 25."¹⁰

On reconsideration, CSN contends that the *Staff Decision* is inconsistent with the Commission's intent in adopting Section 73.515. CSN claims -- without citing any authority -- that those permittees

of the *NCE Order*) which had been pending for a considerable time and were no longer subject to additional competing applications. With the waiver, these "Appendix D Applicants" could either pursue a settlement agreement or file supplements to claim points under the new NCE comparative criteria.) *See also infra* note 19.

⁵ *See Streamlining of Radio Technical Rules*, 15 FCC Rcd 21649, 21670 (2000) ("*Technical Streamlining Order*") (deleting the Note to Section 73.315(a) which exempted NCE FM stations operating on reserved channels 200 through 220 from providing a 70 dBu signal over the entire community of license and, *inter alia*, adding new Section 73.515, requiring every NCE FM station to provide a 60 dBu signal to at least 50 percent of its community of license or 50 percent of the population within the community). *See also infra* at 4-5, regarding 60 dBu coverage requirement. As discussed below, the Commission exempted from this requirement all NCE FM facilities which were authorized prior to the effective date of Section 73.515.

⁶ *See* 16 FCC Rcd at 5106-08. All three applications originally proposed the same channel (212A) and same community of license (Salem, Oregon). To achieve a settlement, CSN submitted a minor engineering amendment to move to channel 211A, thereby resolving its mutual exclusivity with WBC. BFTC agreed to withdraw its application. Pursuant to the waiver provision adopted in the *NCE Order*, CSN received a waiver of Section 73.515. *See* 16 FCC Rcd at 5085 n.25. WBC did not require such a waiver because its proposal provided the required minimum coverage of Salem.

⁷ *See Letter to Matthew H. McCormick, Esq.* (MB Jan. 25, 2002).

⁸ *See supra* note 6.

⁹ The point on the station's contour closest to Salem would be unchanged. More distant portions of the contour would be expanded to bring them closer to Salem.

¹⁰ *See* File No. BMPED-20020308ABM, Exhibit E-4 (Mar. 8, 2002).

which received a waiver of Section 73.515 pursuant to the *NCE Order* should be “entitled to file modifications that improve area and population coverage toward [*i.e.*, in the direction of] the city of license” notwithstanding noncompliance with Section 73.515.¹¹ CSN asserts that its application, by improving the station’s signal toward Salem and by increasing areas and populations served, complies with the requirements of Section 307(b) of the Communications Act of 1934, as amended (the “Act”)¹² concerning the efficient distribution of radio service. CSN also contends that it “is caught in a classic regulatory ‘Catch-22’ posture”¹³ because absent a waiver of Section 73.515, it can improve service only by proposing a city of license change to its facilities. The Commission, however, has not indicated when it might open a window for NCE FM major change applications, including city of license modifications.

Discussion

Reconsideration is appropriate where the petitioner shows either a material error or omission in the original order or raises additional facts not known or not existing until after the petitioner’s last opportunity to present such matters.¹⁴ We find no such error or omission and CSN has raised no new facts. A waiver is appropriate only if special circumstances warrant a deviation from the general rule and such deviation will serve the public interest.¹⁵ The applicant for waiver “must plead with particularity the facts and circumstances which warrant such action.”¹⁶ When the Commission adopted Section 73.515, it found the rule to be in the public interest because an NCE FM “station cannot adequately serve its community of license unless it places a listenable and protected signal over at least a portion of such community.”¹⁷ The Commission determined that the new rule would apply to all applications of authorized NCE FM stations, including modification applications of NCE FM stations with facilities that do not place a 60 dBu signal over 50 percent of the station’s community of license. As the Commission stated:

We proposed in the Notice to apply the new rule only to applications filed after the effective date of the new rule. On further reflection, however, we now believe that licensing of NCE FM stations that do not meet this coverage minimum is contrary to the public interest. Accordingly, the coverage requirements set forth herein will apply to *all applications* pending as of the

¹¹ Petition for Reconsideration at 5.

¹² 47 U.S.C. § 307(b).

¹³ Petition for Reconsideration at 5.

¹⁴ See *WWIZ, Inc.*, 37 FCC 685, 686 (1964), *aff’d sub nom., The Lorain Journal Co. v. FCC*, 351 F.2d 824 (D.C. Cir. 1965), *cert. denied*, 383 U.S. 967 (1966). See also 47 C.F.R. § 1.106.

¹⁵ See *WAIT Radio v. FCC*, 418 F.2d 1153, 1157-59 (D.C. Cir. 1969). See also 47 C.F.R. § 1.3 (rule provisions may be waived “for good cause shown”); 47 C.F.R. § 73.3566(a) (requests for waiver “shall show the nature of the waiver or exception desired and shall set forth reasons in support thereof”).

¹⁶ *Rio Grande Family Radio Fellowship, Inc. v. FCC*, 406 F.2d 664, 665-66 (D.C. Cir. 1968).

¹⁷ *Technical Streamlining Order*, 15 FCC Rcd at 21670.

release date of this Order or filed thereafter.¹⁸

The waiver provision in the subsequent *NCE Order* was intended to help resolve the conflicts among the many mutually exclusive NCE applications filed prior to adoption of Section 73.515.¹⁹ Upon such resolution, as in the case of the CSN-WBC-BFTC group, the limited purpose of the waiver provision was served. The *NCE Order* does not include any similar waiver provision concerning future modifications of such stations, and footnote 25 makes no mention of “grandfathering.” At the time it sought settlement, CSN acknowledged that the waiver was limited to “the context of MM Docket No. 95-31 (see footnote 25 for the explicit statement)” -- *i.e.*, footnote 25 of the *NCE Order* – and that “[i]t is understood that in any further proceeding regarding this station a major change requiring a change in the city of license will be required.”²⁰ We agree with this analysis. CSN offers no explanation as to why applicants which benefited from a one-time waiver policy should be “entitled” to additional waivers while all other prior authorized stations should not be. Accordingly, we reject as meritless CSN’s contention that this application falls within the scope of the waiver which the Commission crafted in 2001 for a limited number of then-pending applications.

CSN also has failed to demonstrate that a waiver of Section 73.515 would serve the public interest insofar as the station’s service would improve “toward” its city of license. Contrary to CSN’s assertion, the Commission clearly stated that “public interest concerns are raised when no portion of a community of license is covered by an NCE FM Station’s service contour.”²¹ Merely improving coverage toward the community of license fails to satisfy the Commission’s requirement concerning direct coverage of a portion of such community. Licensed NCE FM Stations operating on reserved channels, such as KAJC(FM), are required “to provide a predicted 60 dBu signal to at least 50 percent of its community of license or reach 50 percent of the population within the community”²² in proposed modifications of their facilities.

We also reject CSN’s assertion that, by improving the signal toward Salem and by increasing areas and populations served, its application is consistent with Section 307(b).²³ As explained by the

¹⁸ *Id.* (emphasis added).

¹⁹ The Commission stated: “To ensure efficient processing of NCE FM applications, we waive the city grade coverage requirement recently adopted in MM Docket No. 98-93 [*Technical Streamlining Order*] for all mutually exclusive radio applications subject to the comparative procedures adopted herein. Absent a waiver, these radio applicants would have been required to amend their applications by February 19, 2001 to provide a predicted 60 dBu strength signal to at least 50% of their communities of license or to 50% of the population of the community.” *NCE Order*, 16 FCC Rcd at 5085 n.25.

²⁰ See File No. BPED-19980826ML, Exhibit E-4 (submitted as an amendment on July 5, 2001). See also File No. BMPED-20020308ABM, Exhibit E-4.

²¹ *Technical Streamlining Order*, 15 FCC Rcd at 21670.

²² *Id.*

²³ Section 307(b) of the Act requires the Commission “to provide a fair, efficient, and equitable distribution of radio

Commission in the *Technical Streamlining NPRM*, proposing the new coverage requirement, “[t]he association of a broadcast station with a community of license is a basic tenet of the Commission’s allocation scheme for broadcast stations.”²⁴ In adopting the new rule, the Commission concluded that requiring an NCE Station operating on a reserved channel to provide a 60 dBu signal to at least 50 percent of its community of license or reach 50 percent of the population within the community, “balances the Commission’s mandate under Section 307(b) of the Act with the service, technical, and financial realities of operating NCE FM stations.”²⁵ The Commission chose “to measure an NCE FM station’s service to its community of license on the basis of 60 dBu signal strength”²⁶ because, *inter alia*, “this rule will help ensure that at least half of the community receives protected service on a permanent basis” while “ensur[ing] sufficient flexibility in siting facilities and reaching target audiences.”²⁷ Thus, a grant of CSN’s waiver, permitting CSN to improve signal strength while providing no direct signal coverage of areas and populations located within the community of license would undermine Section 307(b) principles.

Finally, we reject CSN’s Catch-22 argument concerning the lack of a filing window. The Act creates no Commission obligation to open a filing window at any particular time or interval.²⁸

Accordingly, IT IS ORDERED, That the Petition for Reconsideration filed by CSN International on July 29, 2002 IS DENIED.

Sincerely,

Peter H. Doyle, Chief
Audio Division

services” among states and communities in considering applications for licenses, modifications, and renewals.

²⁴ *Notice of Proposed Rule Making* in MM Docket No. 98-93, 13 FCC Rcd 14849, 14876 (1998) (“*Technical Streamlining Notice*”) (citing 47 U.S.C. § 307(b)).

²⁵ *Technical Streamlining NPRM*, 15 FCC Rcd at 21670.

²⁶ *Id.*

²⁷ *Id.* See also *Technical Streamlining Notice*, 13 FCC Rcd at 14876 (stating that “[w]here no part of the community of license lies within the 60 dBu protected service contour, the community is at risk of losing all service from the station licensed to it should a second station obtain an authorization for new or modified facilities that precludes the ability of the first station to place its 60 dBu contour over the community of license”).

²⁸ See generally 47 U.S.C. § 309(j); *Implementation of Section 309(j) of the Communications Act -- Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses, First Report and Order*, 13 FCC Rcd 15920, 15973 (1998), *recon. granted in part*, 14 FCC Rcd 8724 (1999), *modified*, 14 FCC Rcd 14521 (1999).

Media Bureau