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In re: **Calvary Chapel of Costa Mesa, Inc.**
KWVE(FM), San Clemente, California
Facility No. 8410
File No. BPH 20070919ABO

Application for Modification of License
Petition for Waiver

Dear Counsel:

We have before us a Petition for Waiver (the "Petition") and application for modification of license filed by Calvary Chapel of Costa Mesa, Inc. ("Calvary"), licensee of KWVE(FM) ("KWVE"), San Clemente, California, seeking waiver of Section 73.215 of the Commission's Rules (the "Rules").¹ For the reasons set out below, we deny the Petition and dismiss the application.

Background. KWVE is "short-spaced"² to co-channel Station KUZZ(FM) ("KUZZ"), Bakersfield, California. Section 73.215 of the Rules allows such short-spacing only if the service and interference contours of the affected stations do not overlap.³ Currently, KWVE employs a

¹ 47 C.F.R. § 73.215. Owens One Company, Inc. ("Owens"), licensee of KUZZ(FM), Bakersfield, California, filed an objection to the Petition (the "Objection"). Calvary filed an Opposition to Informal Objection (the "Opposition") and Owens filed a Reply to Opposition to Informal Objection (the "Reply").

² "Short spacing" occurs when stations are separated by less than the minimum distance specified in 47 C.F.R. § 73.207(b)(1). KWVE and KUZZ are 221.4 km apart, 19.1 km less than the 241 km spacing minimum required by this Rule.

³ KWVE and KUZZ are co-channel, Class B stations. The protected service contour of a Class B station is 54 dBu, determined by application of the Commission's F(50,50) curves; the interference contour at the

directional antenna to avoid contour overlap with KUZZ.⁴ It seeks a waiver of Section 73.215(a) in order to change to an omnidirectional antenna, resulting in an 800 square km overlap of the KUZZ interference and the KWVE service contours.⁵ Calvary submits, however, that actual overlap of the interference and service contours will not occur because there is high and rough intervening terrain between the two stations. It bases its “no overlap” conclusion on: (a) an assertion that the terrain roughness between the two stations is greater than the 50 meter terrain roughness assumed in the Commission’s contour prediction curves;⁶ and (b) that both Longley-Rice⁷ and “point to point” propagation analyses⁸ predict that the KUZZ interference contour does not overlap the KWVE service contour.⁹

In support of its use of a terrain roughness factor to predict the KUZZ interference contour, Calvary cites an unreported Media Bureau letter¹⁰ describing the use of terrain roughness in the context of a request for waiver of the principal community coverage requirement.¹¹ Calvary also relies on *Greater Media Radio Co., Inc.*¹² and *R&S Media*¹³ for the proposition that the Commission previously has considered waiver of the Section 73.215(a) contour overlap prohibition. Additionally, Calvary claims that Section 73.313(e) of the Rules¹⁴ establishes that “alternate methods of prediction may be used to determine coverage.”¹⁵ Calvary also claims that, in calculating the KUZZ interference contour, it is justified in using KUZZ’s actual HAAT, rather than its “reference” HAAT as required by Section 73.215. If the Section 73.215 reference HAAT were used, Calvary argues, it would yield anomalous results because contours would be calculated on the basis of a negative height above ground for the KUZZ antenna.¹⁶ Finally,

boundary of a protected station’s 54 dBu contour must not exceed 34 dBu, determined by application of the Commission’s F(50,10) curves. See 47 C.F.R. §§ 73.215(a)(1)-(2), 73.313, 73.699, Fig. 9 and 9a.

⁴ See Petition, Engineering Statement at 1.

⁵ See Opposition at 2, Engineering Statement at Exhibit 1-E. As noted in the Opposition, the KUZZ interference contour would also overlap the KWVE 70 dBu principal community contour. *Id.*

⁶ See Petition, Engineering Statement at 1-2, Exhibit 1.

⁷ See Rice, P.L., Longley, A.G., Norton, K.A., Barsis, A.P., “Transmission Loss Predictions for Tropospheric Communications Circuits,” NBS Technical Note 101 (Revised), Volumes I and II, U.S. Department of Commerce, 1967.

⁸ See 1998 Biennial Regulatory Review - *Streamlining of Radio Technical Rules in Parts 73 and 74 of the Commission’s Rules*, Second Report and Order, 15 FCC Rcd 21649, 21652 (2000) (“*Streamlining Order*”).

⁹ See Petition at 3, Engineering Statement at 1-2, Exhibit 7.

¹⁰ Petition at 2 (citing *Letter to Mark Lipp* (Aug. 8, 2002)).

¹¹ See 47 C.F.R. § 73.315(a). (A station’s 70 dBu “principal community” contour must encompass its city of license. The referenced letter did not grant the requested waiver.).

¹² *Greater Media Radio Co., Inc.* Memorandum Opinion and Order, 15 FCC Rcd 7090 (1999) (“*Greater Media*”).

¹³ *R&S Media*, Memorandum Opinion and Order and Order to Show Cause, 19 FCC Rcd 6300 (MB 2004) (“*R&S Media*”).

¹⁴ 47 C.F.R. § 73.313(e).

¹⁵ Opposition at 2-3.

¹⁶ See Petition at 2, Engineering Statement at 1.

Calvary claims that grant of the requested waiver is warranted because the requested facilities would allow Calvary "to increase the population it serves by over 2,500,000 persons."¹⁷

Owens asserts that if Calvary believes that the Section 73.215 reference HAAT provisions yield anomalous results, it should have filed a petition for rulemaking rather than a waiver request.¹⁸ It also contends that Calvary cannot rely on alternative propagation analyses to show lack of actual contour overlap because the "Commission has never sanctioned the use of terrain shielding, terrain roughness or similar alternative prediction methodologies in connection with Section 73.215 showings."¹⁹

Owens also points out that grant of the waiver would not improve KWVE's "less than 100% coverage of San Clemente, its community of license."²⁰ It also establishes that the additional area that would be served by KWVE, were the waiver granted, is "far from underserved - being already served by no fewer than 85 aural services."²¹ Owens distinguishes *R&S Media* as a case in which there was no possible site that would avoid contour overlap, even with use of a directional antenna,²² whereas, here, Calvary "is proposing to *eliminate* the use of a directional antenna that *currently* protects KUZZ at KWVE's *existing* site."²³ *Greater Media* is inapposite, Owens claims, because, there, the Commission denied the request for waiver of Section 73.215(a), stating that the record "was devoid of any showing that the proposed antenna cannot be directionalized to avoid creation of new predicted interference."²⁴ Owens argues that Calvary's reliance on Section 73.313(e) of the Rules is misplaced because the Commission has never waived the Section 73.215(a) contour overlap prohibitions based on the procedures set forth in Section 73.313."²⁵

Discussion. We agree with Owens that neither of the cases cited by Calvary is persuasive here. In *Greater Media* a waiver was denied because the waiver proponent made an insufficient demonstration that the waiver was necessary in order to remedy "patently inadequate" service to its community of license, extend its coverage to unserved or underserved areas, or that a suitable site was unavailable.²⁶ Similarly, Calvary's requested waiver would not enhance its coverage of San Clemente, its community of license. Moreover, as Owens demonstrates, the greater Los

¹⁷ Petition at 3.

¹⁸ Opposition at 1.

¹⁹ Opposition at 2 (citing *Amendment of Part 73 of the Commission's Rules to Permit Short-Spaced FM Station Assignments by Using Directional Antennas*, Memorandum Opinion and Order, 6 FCC Rcd 5356, 5358 (1991)).

²⁰ *Id.*

²¹ *Id.* (citing Engineering Statement at 2-4 and Exhibit E-3).

²² Opposition at 2 (citing *R&S Media*).

²³ *Id.* (emphasis in original).

²⁴ *Id.* at 2-3 (citing *Greater Media*, 19 FCC Rcd at 7099).

²⁵ Reply at 3 (citing *1998 Biennial Regulatory Review - Streamlining of Radio Technical Rules in Parts 73 and 74 of the Commission's Rules*, Notice of Proposed Rulemaking and Order, 12 FCC Rcd 14849, 14858 (1998), noting that, the Commission considered, but did not adopt, a proposal whereby, *inter alia*, licensees could accept interference despite contour overlap).

²⁶ *Greater Media*, 15 FCC Rcd at 7095-7096. Although the staff subsequently authorized the *Greater Media* licensee to operate on a "short spaced" basis, that unpublished action is without precedential weight. See 47 C.F.R. § 0.445(e).

Angeles area, where Calvary's station is located, is abundantly covered by other aural services.²⁷ As Owens notes, in *R&S Media* there were exceptional circumstances not present here, *i.e.*, in *R&S Media* a directional antenna would not have sufficed to eliminate the contour overlap and there were no alternative sites for the waiver proponent's station.²⁸ Here, however, the existing KWVE directional antenna does protect against contour overlap and Calvary has made no showing that alternative sites are not available.

The Commission has not accepted alternative propagation showings that purport to demonstrate that stations will meet the contour overlap restrictions of Section 73.215(a) and we are not persuaded to do so here. Calvary's citation to Section 73.313(e) of the Rules is unavailing because that Rule section deals with the use of supplemental showings in the context of coverage prediction - not interference calculations. Calvary's reliance on the terrain roughness factor curves in Section 73.699 Fig. 10(e) of the Commission's Rules is misplaced. Use of those curves was suspended shortly after they were adopted because they often yielded anomalous results.²⁹ Similarly, we cannot find that the "point-to-point" propagation model discussed in the *Streamlining Order* - but not adopted by the Commission - is an appropriate means of estimating contour overlap pursuant to Section 73.215(a).³⁰ To the extent that Calvary believes that the Commission should modify its rules to permit alternative propagation showings or change the requirement that the "reference height" be used in interference contour calculations, to establish compliance with Section 73.215(a), it should file a petition for rulemaking.³¹

In sum, the Commission has waived Section 73.215(a) to allow otherwise-prohibited contour overlap only in very few and very narrow circumstances, none of which is present here.³² It has not accepted alternative propagation analyses in support of requests for waiver of the Section 73.215(a) contour overlap provisions. Changes in the Commission's practice in this regard would defeat the principal purpose of Section 73.215(a), *i.e.*, to provide applicants with increased flexibility (relative to the Section 73.207 distance separation criteria) without burdening the Commission with complex, time-consuming and litigable waiver requests.³³ We therefore are denying Calvary's waiver request and dismissing its modification application.

²⁷ See Opposition at 2.

²⁸ See Reply at 2.

²⁹ See *Amendment of Part 73 of the Commission's Rules to Permit Short-Spaced FM Station Assignments by Using Directional Antennas*, Memorandum Opinion and Order, 6 FCC Rcd 5256, 5358-59 n.12. ("The FM rules have contained provisions for this [terrain roughness] factor for many years . . . but the effective date of these provisions was stayed indefinitely in 1977, pending further review by the Commission.").

³⁰ As noted in the *Streamlining Order*, 15 FCC Rcd at 21652, the suitability of the point-to-point model was contested by commenting parties and the Commission stated that it was considering extensive revisions to the model. The model has not been approved by the Commission as a means of estimating FM station interference contours. See <http://www.fcc.gov/oet/fm/ptp/Welcome.html>.

³¹ See *Paralyzed Veterans of America v. D.C. Arena, L.P.*, 117 F. 3d 579, 586 (D.C. Cir. 1997), *cert. denied sub nom. Pollin v. Paralyzed Veterans of America*, 523 U.S. 1003 (1998); *Syncor Int'l Corp. v. Shalala*, 127 F. 3d 90, 94 (D.C. Cir. 1997) (new interpretation of an agency rule in conflict with prior definitive interpretation requires notice and comment).

³² Calvary's only asserted public interest benefit realized by the waiver is expansion of its own coverage outside its principal community to an area that is neither unserved nor underserved. "More coverage" standing alone, has long been regarded as an insufficient basis for waiver of interference prohibitions. See, *e.g.*, *Stoner Broadcasting System, Inc.*, Memorandum Opinion and Order, 49 FCC 2d 1011, 1012 (1974).

³³ Cf. *Creation of a Low Power Radio Service*, Third Report and Order and Second Further Notice of Proposed Rulemaking, 22 FCC Rcd 21912, 21945 (2007) (stating that use of alternative propagation

Decision/Action. Accordingly, IT IS ORDERED that the Petition for Waiver filed by Calvary Chapel of Costa Mesa, Inc. IS DENIED. IT IS FURTHER ORDERED, that the Application for Modification of License, File No. BPH-20070919ABO, IS DISMISSED.

Sincerely,

Peter H. Doyle
Chief, Audio Division
Media Bureau

models, such as Longley-Rice, "impose enormous staff processing burdens and are typically subject to opposition").