



Federal Communications Commission
Washington, D.C. 20554

February 27, 2009

DA 09-526

In Reply Refer to:

1800B3-SS

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Seminole Tribe of Florida
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1000 Potomac St., N.W., Fifth Floor
Washington, DC 20007

In re: **Seminole Tribe of Florida**
New NCE-FM Station, Big Cypress, FL
Facility ID No. 175499
File No. BNPED-20071019AUM

Petition for Reconsideration

Dear Counsel:

We have before us a Petition for Reconsideration ("Petition") filed December 14, 2007, by the Seminole Tribe of Florida ("Seminole"). Seminole seeks reconsideration of the November 8, 2007, letter¹ dismissing its application (the "Application") for a new noncommercial educational ("NCE") FM station at Big Cypress, Florida, as unacceptable for filing. It requests reinstatement of the Application *nunc pro tunc*, and a waiver of Section 73.515 of the Commission's Rules (the "Rules").² For the reasons set forth below, we grant the Petition and waiver request, and reinstate the Application.

Background. Seminole filed the Application during the NCE filing window in October 2007.³ A staff engineering review of the Application revealed that the proposed facility failed to provide adequate community coverage as required by Section 73.515 of the Rules. Specifically, the proposed 60 dBu contour, using the standard contour prediction method in Section 73.313(e) of the Rules,⁴ failed to cover at least 50 percent of the Big Cypress Reservation ("BCR") or 50 percent of the Tribal members who reside on the BCR. Seminole acknowledged this situation in the Application and provided a supplemental showing based on the Longley-Rice propagation methodology. The Seminole study established that 91 percent of the Tribal members reside within the proposed station's 60 dBu contour.⁵

¹ *Letter to Seminole Tribe of Florida* (MB rel. Nov. 8, 2007) ("Division Letter").

² *See Division Letter* at 3; *see also* 47 C.F.R. § 73.515.

³ The filing window opened on Friday, October 12, 2007. *See Media Bureau Announces NCE FM New Station and Major Modification Application Filing Window for New and Certain Pending Proposals; Window to Open on October 12, 2007*, Public Notice, 22 FCC Rcd 2726 (MB 2007); *Media Bureau to Extend Window for NCE FM New Station and Major Change Applications; Window Will Close on October 22, 2007*, Public Notice, 22 FCC Rcd 18680 (MB 2007).

⁴ 47 C.F.R. § 73.313(e).

⁵ *See Application*, Exhibits 1 and 1B.

The *Division Letter* concluded that, notwithstanding the supplemental showing, the application was fatally defective. It noted that the rules define a station's "protected" service area on the basis of the standard Section 73.313 contour methodology. The *Division Letter* stated that it had previously held that in these circumstances it would be inconsistent with Section 307(b) of the Communications Act of 1934, as amended (the "Act"),⁶ to license a station to a community to which it did not provide protected service.⁷ Accordingly, consistent with prior staff actions,⁸ the *Division Letter* dismissed the Application.

In its Petition, Seminole seeks reconsideration of the dismissal of the Application based upon a further showing that: (1) as determined by the standard contour methodology, the proposed station would place a 60 dBu signal over the "essential governmental and business functions that make up the community of Big Cypress;"⁹ (2) the Commission has permitted supplemental studies to demonstrate compliance with community coverage requirements; and (3) a waiver of Section 73.515 is required to achieve the goals of Section 307(b) of the Act and to fulfill the Commission's "fiduciary duty to ensure that Indian Tribes have access to communications services that will serve Indian reservations."¹⁰

Discussion. When an applicant seeks waiver of a rule, its burden is to plead with particularity the facts and circumstances which warrant such action.¹¹ Thus, an applicant for waiver "faces a high hurdle even at the starting gate."¹² While the Commission must consider carefully all waiver requests, such requests must be supported by a compelling showing in order to be granted.¹³ "A waiver is appropriate

⁶ 47 U.S.C. § 307(b).

⁷ See *KDAY(FM), Independence, CA*, Letter, 9 FCC Rcd 2753 (MB 1994) ("*KDAY*"). In this case, the staff denied a commercial FM construction permit application where the community of license lay outside the proposed station's 54 dBu protected service contour of the Class B station. Although the applicant submitted a supplemental showing to demonstrate that a portion of the community would receive a 70 dBu strength signal, *none* of the community would receive a 54 dBu strength signal based on standard Section 73.313 calculations. The staff denied the proposal:

[O]utside of this [protected service] contour, interference from other co-channel and adjacent channel stations can occur under our rules. It simply is not possible, under any rational allocations scheme, to protect FM stations to the point at which the signal is too weak to receive. Thus, the potential exists that another station could be authorized or modified which would not interfere with *KDAY*'s 54 dBu protected service contour, but would interfere with *KDAY*'s service to Independence *KDAY* would have no standing to contest any interference created in this manner, since the Commission's rules do not protect any service outside the . . . protected contour.

⁸ See, e.g., *Letter to Cedar Cove Broadcasting, Inc. re KKGK, Eaton, Colorado*, (MB rel. Aug. 31, 2006).

⁹ Petition, Declaration of Frank E. Harley, III at 1.

¹⁰ See *Establishing a Government-to-Government Relationship with Indian Tribes*, Policy Statement, 16 FCC Rcd 4078 (2000) ("*Policy Statement*").

¹¹ 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)).

¹² *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969) ("*WAIT Radio*").

¹³ *Greater Media Radio Co., Inc.*, Memorandum Opinion and Order, 15 FCC Rcd 7090 (1999) (citing *Stoner Broadcasting System, Inc.*, Memorandum Opinion and Order, 49 FCC2d 1011, 1012 (1974)) ("*Greater Media*").

only if special circumstances warrant a deviation from the general rule and such deviation will serve the public interest.”¹⁴

To the extent that Seminole treats its proposed community of license as the BCR, we conclude that a waiver of Section 73.515 is warranted. In the commercial station context,¹⁵ we have recognized that there may be instances in which strict compliance with the city coverage requirement may be difficult due to the highly irregular shape of a community’s boundaries. In such instances, we have granted a waiver of the pertinent city grade coverage rule.¹⁶ Similar considerations are present here. The irregularly shaped BCR is long and thin, extending 28 kilometers east to west, while the north and south borders are as close as 4.8 kilometers. More importantly, the Application discloses that the eastern half of the BCR is virtually uninhabited, comprised substantially of Everglades’ swamps. The population resides chiefly in the western half – an area served by Seminole’s proposed 60 dBu contour.

Seminole asserts that the proposed station’s 60 dBμ contour would cover 47 percent of the Tribal population within the BCR.¹⁷ The Application, therefore, falls only three percent short of the 50 percent coverage threshold required by Section 73.515. This, however, is a numeric shortfall of only 24 persons. We believe that this deficiency may be properly characterized as *de minimis*, particularly where a planned community with a population of 1300 – “Otter Creek” -- with affordable Tribal housing, town houses, and a commercial center, will be built within the proposed station’s 60 dBμ contour.¹⁸ The Commission has granted construction permits to serve localities with no existing resident populations where a “community” was expected to “spring up.”¹⁹ Accordingly, we believe that it is appropriate to take cognizance of this future development.

In the alternative, we must consider whether the Application satisfies Section 73.515 based on its coverage of the community of Big Cypress. Initially, we note that Big Cypress is neither a Census Designated Place nor an incorporated jurisdiction. A station, however, may be licensed to a community if

¹⁴ *Northwest Cellular Telephone Co. v. F.C.C.*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (citing *WAIT Radio*, 418 F.2d at 1157).

¹⁵ See 47 C.F.R. § 73.315.

¹⁶ *Community Communications Corp.*, Hearing Designation Order, 5 FCC Rcd 3413 (MMB 1990) (Section 73.315 waived due to size of Indianapolis, Indiana); *Northland Broadcasters, A Limited Partnership*, Hearing Designation Order, 4 FCC Rcd 6508 (MMB 1989) (due to rugged terrain, coverage of all of Anchorage, Alaska was not possible); *George S. Flinn, Jr.*, Hearing Designation Order, 5 FCC Rcd (MMB 1990) (waiver of Section 73.315 granted where coverage of Corpus Christi, Texas – boundaries approximately 43.5 kilometers from north to south – was impossible); *Lester H. Allen*, Order, 15 FCC 2d 767 (1968) (Section 73.315 waived for all applicants based on irregular shape of community); *Mid-Ohio/Capital Communications Limited Partnership*, Initial Decision, 5 FCC Rcd 424 (ALJ 1990) (Section 73.315 waived due to the size of Columbus, Ohio); *Quality Broadcasting Corp.*, Memorandum Opinion and Order, 62 FCC 2d 586 (1977) (Section 73.315 waived for failure to cover a portion of Las Vegas, Nevada, more than nine miles from downtown and a recently annexed portion of the city).

¹⁷ See Application at Exhibit 14B.

¹⁸ Petition at 4; see also n.37, *supra*.

¹⁹ See *Seven Locks Broadcasting Co.*, Decision, 37 FCC 82 (1964) (“Indications of the Commission’s prior consistent approach to the community question are seen in the following grants of applications . . . for Page, Ariz., where no population at all was shown at the time of grant, and the community was expected to spring up during the construction of a nearby dam; [and] for Wood Ridge, Fla., where at the time of grant Wood Ridge had a population of 7 persons, but was expected to grow into a community of 2,000 persons in 24 months . . .”).

it can be shown that it is a “geographically identifiable population grouping.”²⁰ Seminole has identified the clustered locations of the central governmental offices of the BRC, the Billie Swamp Safari complex, the Swamp Water Café, the Ahfachkee School and several businesses, all of which lie within the proposed station’s 60 dBu contour. Only one significant business, the BCR Casino, lies outside this contour. On similar facts, the Commission allotted an FM channel to Red Lake, Minnesota, which is located on the Red Lake Reservation.²¹ Given the remote and isolated nature of Big Cypress, we conclude that this is a sufficient showing.

Finally, we agree with Seminole that reinstatement of the Application is appropriate due to the “unique relationship between the FCC and Indian tribes.”²² The Commission has made a commitment to work with Indian tribes to ensure “that . . . [they] have adequate access to communications services.”²³ The Commission has acknowledged that it has a “trust relationship with Indian Tribes” and a “fiduciary” duty to assist Tribes in “promoting tribal self-sufficiency and economic development.”²⁴ Furthermore, the Commission has affirmed its commitment to work with Indian Tribes to ensure that they “have adequate access to communications services.”²⁵ In addition, we note that Seminole has made it clear that its proposed station would be focused on programming of interest to the Seminole people.²⁶

Conclusion/Action. Accordingly, IT IS ORDERED, that the Petition for Reconsideration filed by the Seminole Tribe of Florida, IS GRANTED. IT IS FURTHER ORDERED, that pursuant to Section 1.3 of the Rules, 47 C.F.R. § 1.3, the request for waiver of Section 73.515 of the Rules, filed by Seminole Tribe of Florida, IS GRANTED. IT IS FURTHER ORDERED, that Seminole Tribe of Florida’s application for a new NCE-FM station at Big Cypress, Florida, (File No. BNPED-20071019AUM) IS REINSTATED AND ACCEPTED FOR FILING. Petitions to deny are due within thirty (30) days following the issuance of a subsequently issued Public Notice announcing the Application’s acceptance for filing. If, after the petition to deny period has run, there is no substantial and material question concerning the grantability of Seminole’s Application, we will, by Public Notice, grant the Application.

Sincerely,

Peter H. Doyle
Chief, Audio Division
Media Bureau

cc: Seminole Tribe of Florida

²⁰ *Kenansville, FL*, Report and Order, 10 FCC Rcd 9831, 9832 (1995).

²¹ *Bemidji and Red Lake, MN*, Report and Order, 10 FCC Rcd 4926 (MB 1995).

²² Petition at 8.

²³ *See Policy Statement*, 16 FCC Rcd at 4081 (2000).

²⁴ *Id.* at 4080-81 (2000).

²⁵ *Id.* at 4081.

²⁶ *See Application at Attachment 2, Exhibit 2* (“[Seminole] would bring to bear its extensive experience in administering cultural programs, educating Tribal members, and preserving Tribal history in developing educational programming for its NCE-FM radio station. To develop local news and public affairs content, the [Seminole] station would also rely, in part, upon the journalistic expertise of the veterans at the Seminole Tribune, an award winning bi-monthly publication serving members of the Tribe and the broader public for more than 25 years.”).