



Federal Communications Commission
Washington, D.C. 20554

March 6, 2009

DA 09-557

In Reply Refer to:

1800B3-SS

Released: March 6, 2009

Spirit Radio of North Florida, Inc.
c/o Aaron P. Shainis, Esq.
Shainis & Peltzman, Chartered
1850 M Street, N.W., Suite 240
Washington, DC 20036

In re: **Spirit Radio of North Florida, Inc.**
WWLC(FM), Cross City, FL
Facility ID No. 121772
File No. BMPED-20080130ANS

Petition for Reconsideration

Dear Counsel:

We have before us a Petition for Reconsideration ("Petition") filed May 14, 2008, by Spirit Radio of North Florida, Inc. ("Spirit"). Spirit seeks reconsideration of the April 9, 2008, letter¹ denying Spirit's waiver request² and dismissing as unacceptable for filing its minor modification application to change the antenna height and location of its noncommercial educational ("NCE") FM station WWLC(FM), Cross City, Florida (the "Application"). For the reasons set forth below, we deny the Petition.

Background. A staff engineering review revealed that the Application failed to comply with Section 73.509 of the Rules with respect to third-adjacent channel Class C1 station WUFT-FM, Gainesville, Florida.³ Specifically, the proposed interfering (100 dB μ) contour would cause overlap to WUFT-FM's protected (60 dB μ) contour. Spirit recognized this violation and requested a waiver, arguing that the predicted overlap with WUFT-FM was *de minimis*. Spirit claimed that the amount of overlap land area is 58 square kilometers, and the population inside the overlap area is 602. Spirit also claimed that the percentage of overlap caused by the Application was 0.10 percent of the entire population inside WUFT-FM's protected coverage area. Spirit also cited a case in which the Commission allegedly granted a similar waiver.⁴

The staff rejected Spirit's arguments, concluding that the Application would cause WUFT-FM to lose service area and population served without any countervailing benefit in return. The *Division Letter* also distinguished between those cases in which the Commission has granted waivers of Section 73.509 where an *existing* NCE station sought to extend its 60 dBu service contour so as to overlap the interfering

¹ Letter to Spirit Radio of North Florida, Inc. (MB rel. Apr. 9, 2008) ("Division Letter").

² Spirit had requested a waiver of the contour overlap provisions of 47 C.F.R. § 73.509 of the Commission's Rules (the "Rules").

³ File No. BLED-19811007AJ.

⁴ See *Educational Information Corporation*, Memorandum Opinion and Order, 6 FCC Rcd 2207 (1991) ("EIC").

contour of another NCE station and thereby create new received overlap, and the Application, which would *cause* prohibited overlap and *create* new interference to existing listeners. The staff noted that the type of interference caused by the proposed facility might not be recognized by listeners as interference. More importantly, the staff explained that if interference were to occur, third-adjacent channel interference would result in the replacement of one signal by another (not complete loss of service) with the interference greatly depending on the quality of the receivers in use. The staff concluded that it is the Commission's charge, not applicants or licensees, to establish definitions of protected service and to ensure that existing protected service remains so. Because the requested waiver of Section 73.509 did not fall within existing precedent, the staff denied the waiver request and dismissed the Application.

In its Petition, Spirit states that the staff's denial of Spirit's waiver request is inconsistent with the Commission's decision in *EIC*.⁵ Spirit also argues that the Application is in the public interest because it will expand its coverage area thus bringing its service to more people than would lose WUFT-FM's service.⁶ Spirit requests, therefore, that the Commission grant its waiver request and reinstate the Application.

Discussion. The Commission will consider a petition for reconsideration only when the petitioner shows either a material error in the Commission's original order, or raises additional facts, not known or existing at the time of petitioner's last opportunity to present such matters.⁷ Spirit has not met those threshold requirements in its Petition.

When an applicant seeks waiver of a rule, its burden is to plead with particularity the facts and circumstances which warrant such action.⁸ Thus, an applicant for waiver "faces a high hurdle even at the starting gate."⁹ While the Commission must consider carefully all waiver requests, such requests must be supported by a compelling showing in order to be granted.¹⁰ "A waiver is appropriate only if special circumstances warrant a deviation from the general rule and such deviation will serve the public interest."¹¹ In its Petition, Spirit reiterates its assertion that there are compelling reasons for waiver of Section 73.509 of the Rules to reinstate the Application even though its proposed facility would cause prohibited interference to WUFT-FM. In support of its request, Spirit claims that the benefits to the public interest of its expanded service outweigh the *de minimis* overlap caused to WUFT-FM.¹² Specifically, Spirit argues that its proposed modification of its NCE-FM station's interfering contour

⁵ *EIC*, 6 FCC Rcd 2207 (1991).

⁶ In the Application, Spirit indicates that its proposal "will allow the proposed facility to serve 73,022 people within its proposed coverage contour." Application, Attachment 22, "Engineering Narrative and Technical Exhibits" at 3. In neither the Application nor the Petition does Spirit indicate the actual number of people who will receive new service from WWLC(FM) should the Application be approved.

⁷ See 47 C.F.R § 1.106. See also *WWIZ, Inc.*, Memorandum Opinion and Order, 37 FCC 685, 686 (1964), *aff'd sum nom. Lorain Journal Co. v. FCC*, 351 F.2d 824 (D.C. Cir. 1965), *cert. denied*, 387 U.S. 967 (1966).

⁸ 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)).

⁹ *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969) ("*WAIT Radio*").

¹⁰ *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*").

¹¹ *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).

¹² Petition at 3.

encompasses only 602 persons, or 0.10 percent of the service area of the Station. Nevertheless, we agree with the decision in the *Division Letter* and find waiver of Section 73.509 unwarranted on the facts of this case.

Section 73.509 states in pertinent part: “An application for a new or modified NCE-FM station other than a Class D (secondary) station will not be accepted if the proposed operation would involve overlap of signal strength contours with any other station licensed by the Commission and operating in the reserved band . . . [contour overlap standards are set forth in a chart included in the rule].” Spirit argues that the staff erred in denying Spirit’s waiver request on the basis that the Application would *cause* prohibited overlap rather than *receive* prohibited overlap. Spirit states that the Commission in *EIC* granted a Section 73.509 waiver request because it found that significant additional service would be provided by the expansion of the applicant’s signal and the increase in overlap was “very small.”¹³ Interference, states Spirit, “is interference, plain and simple,” whether it is an “expansion of interference” or the “creation of new interference,”¹⁴ and Spirit argues that the “important point is that in the instant situation, the interference is *de minimis*.”¹⁵

Spirit’s argument is misguided, as it fails to acknowledge the critical distinction between “overlap received,” as in *EIC*, and the “overlap caused” by the Application. The staff’s dismissal of the Application did not turn on whether overlap would be received for the first time, as opposed to increasing existing overlap received, by WWLC(FM). Rather, the *Decision Letter* focused on the fact that the Application proposed to *cause* prohibited overlap to WUFT-FM. The Commission’s policy with regard to prohibited NCE received overlap is well settled. On July 16, 1981, the Commission, *en banc*, delegated authority to the staff to waive Section 73.509 to permit small amounts of interference *received* by an NCE-FM station proposing a facility improvement, provided such interference did not exceed roughly five percent of the proposed service area. The Commission indicated that “these waivers will only be granted when the applicant provides sufficient justification such as a lack of alternative transmitter sites and/or frequencies.”¹⁶ A decade later, the Commission elaborated on this policy in *EIC*, noting that this delegation where sufficient justification is provided “did not . . . nullify the longstanding prohibition against occurrences of harmful overlap, including overlap received.”¹⁷ In so doing, it reaffirmed the principle that Section 73.509 is designed both to prevent each NCE station from causing harmful

¹³ *Id.* See also *EIC*, 6 FCC Rcd at 2209 (1991).

¹⁴ Spirit states that, in *EIC*, the Commission waived Section 73.509 and allowed Station WCPE(FM), Raleigh, North Carolina to both receive overlap for the first time from Station WCCE(FM), Buies Creek, North Carolina, and slightly increase the existing overlap received from Station WXYC(FM), Chapel Hill, North Carolina.

¹⁵ Petition at 3.

¹⁶ See *Delegation of Authority to the Chief of the Broadcast Bureau to Waive Small Amounts of Interference Received by Non-Commercial Educational FM Proposals*, Public Notice, FCC 81-332, 49 RR2d 1524 (Jul. 17, 1981). The Commission replaced this signal strength ratio methodology with a contour overlap standard in 1985. See *Changes In The Rules Relating To Noncommercial Educational FM Broadcast Stations*, Memorandum Opinion and Order, MM Docket No. 20735, 50 Fed. Reg. 27954 (July 9, 1985) (“1985 Order”). The signal strength ratio method served to identify the area in which the quality of service was predicted to fall below the minimally acceptable level. The contour overlap method identifies not only the area in which quality of service falls below the minimally acceptable level, but also the larger area in which the quality of service is predicted to be better than minimally acceptable overall, but nonetheless may be diminished for some listeners. See *Board of Education of City of Atlanta (WABE-FM)*, Memorandum Opinion and Order, 11 FCC Rcd 7763, 7764 n. 1 (1996) (“*WABE-FM*”). The 1985 Order also modified the Bureau’s delegated authority to grant waivers to conform to this new methodology. Specifically, such authority is now limited to 10 percent “overlap” received compared to five percent “interference” received under the old policy. See 1985 Order, 50 Fed. Reg. at 27959-27960.

¹⁷ *EIC*, 6 FCC Rcd at 2208 (1991).

interference to other NCE stations and to ensure interference-free service within each NCE station's own service contour.¹⁸

However, the Commission has recognized, as Spirit notes, that there is a need for some flexibility. We find that this flexible approach is borne out in the Commission's holding on *received* overlap, as opposed to *caused* overlap, in *EIC* and the policy initially established by the Commission in 1981. While the Commission has and will, when sufficient justification is proposed, allow an existing NCE station to receive prohibited overlap when improving the station's facilities, Spirit has provided no precedent in which the staff has permitted such stations to cause prohibited overlap, and we are aware of none, particularly in circumstances in which an applicant has failed to show that rule-compliant operations are not feasible. Notwithstanding Spirit's contrary protestations, the Commission has drawn a meaningful distinction between overlap received and overlap caused.¹⁹

Moreover, as stated in the *Division Letter*, while requests for waivers of small amounts of second- and third-adjacent channel overlap caused may have individual appeal, routine waivers of Section 73.509, such as Spirit's proposal in the instant context, would undermine the Commission's well-settled NCE-FM licensing scheme. It would result in vast increases in interference levels in the congested reserved band while causing disruption to existing listening patterns. This interference interrupts the continuity of existing service provided by WUFT-FM throughout its protected service area, and thus diminishes the quality of FM service provided by WUFT-FM. Over time, the grant of numerous similar waivers would degrade the quality of existing FM reception within stations' theoretically protected 60 dBμ service contours throughout the entire NCE-FM band.²⁰

We note that the factors presented here in support of the request for waiver of the rule are generally true for applicants which seek waiver of the rule for second- and third-adjacent channel contour overlap caused to another station. Moreover, Spirit's argument, if accepted, would eviscerate the rule, *viz.*, establishing that a Section 73.509 waiver is warranted in circumstances where spectrum congestion prevents the licensing of a rule-compliant station proposal. Accordingly, on facts essentially the same as those presented here, we recently concluded that a waiver of Section 73.509 would not outweigh the benefits conferred by adherence to the rule.²¹ For the same reasons, we will deny Spirit's request.

¹⁸ See *Lakeside Telecommunications, Inc.*, Memorandum Opinion and Order, 20 FCC Rcd 763, 764 (2005).

¹⁹ See, e.g., *Educational Information Corporation*, Memorandum Opinion and Order, 12 FCC Rcd 6917, 6918-19 (1997) (observing that the applicant "ignores the critical distinction" between overlap caused and overlap received); *recon. denied*, 13 FCC Rcd 23746, 23747-48 (1998) (rejecting applicant's argument on reconsideration that the Commission had focused on an "irrelevant" distinction between overlap "caused" and overlap "received").

²⁰ *Division Letter* at 2, n.2. This has been called the "Swiss cheese" effect, where a station's protected service contour is punctured by "holes" of interference from multiple second- and third-adjacent channel FM stations. *Revision of FM Rules*, Notice of Proposed Rulemaking, 21 RR 1655, 1674 (1961).

²¹ See *Centenary College*, Letter, DA-08-2630 (MB rel. Dec. 3, 2008) (rejecting applicant's argument on reconsideration that a waiver of Section 73.509 outweighs the benefits conferred by adherence to the rule).

Conclusion/Action. Spirit has not shown a material error or omission in the *Division Letter*, nor has it shown changed circumstances that otherwise warrant reconsideration. Accordingly, IT IS ORDERED, that the Petition for Reconsideration filed by Spirit Radio of North Florida, Inc., IS DENIED.

Sincerely,

Peter H. Doyle
Chief, Audio Division
Media Bureau

cc: Spirit Radio of North Florida, Inc.