Federal Communications Commission
Washington, D.C. 20554

October 24, 2012

DA 12-1709
In Reply Refer to:
1800B3-SS
Released: October 24, 2012

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In re: **NCE MX Group 208**

Klamath Falls SDA Church
New NCE-FM, Klamath Falls, OR
Facility ID No. 174303
File No. BNPED-20071022BCL

Petition to Deny

Dear Counsel:

This letter concerns the referenced application (the "Application") of Klamath Falls SDA Church ("KFSC") for a new noncommercial educational ("NCE") FM station at Klamath Falls, Oregon. On July 29, 2008, UCB USA, Inc. ("UCB") filed a timely "Petition to Dismiss or Deny" (the "Petition").[1] For the reasons set forth below, we deny the Petition and grant the Application.

Background. The Application[2] was part of NCE Mutually Exclusive ("MX") Group No. 208 in which UCB proposed to serve Altamont, Oregon, and KFSC proposed to serve Klamath Falls, Oregon.[3] Under the "fair distribution" procedures established by the Commission pursuant to Section 307(b) of the Communications Act of 1934, as amended (the "Act"),[4] only KFSC asserted that it was eligible for a fair distribution preference. Accordingly, UCB was eliminated, and KFSC was named the tentative selectee

[1] KFSC opposed (the "Opposition") the Petition on August 25, 2008, to which UCB replied (the "Reply") on September 4, 2008.

[2] KFSC amended the Application on January 7, 2008, to slightly reduce its directional antenna pattern (the "January Amendment"). This amendment had no effect on the level of first and second NCE Service Area proposed. *See* January Amendment, Attachment 13, "Section 307(b) Service Exhibit" and "New Amended Section 307(b) Service Exhibit."

[3] *See Threshold Fair Distribution Analysis of 32 Groups of Mutually Exclusive Applications for Permits to Construct New or Modified Noncommercial Educational FM Stations, Memorandum Opinion and Order,* 23 FCC Rcd 10213, 10220 (MB 2008) ("*Comparative Consideration Order*").

[4] *See* 47 U.S.C. § 307(b); 47 C.F.R. § 73.7002(a).

in NCE MX Group No. 208.[5] The staff then accepted the Application for filing and established a 30-day period for filing petitions to deny.[6] On July 29, 2008, UCB timely filed its Petition.

In the Petition, UCB argues that KFSC's proposed directional pattern violates Section 73.316(c)(1) of the Commission's Rules (the "Rules")[7] and that, due to significant terrain obstructions, the Application fails to satisfy applicable community coverage requirements of Section 73.515 and line-of-sight requirements of Section 73.315(b) of the Rules.[8] To support the latter contention, UCB attaches an alternate contour-prediction analysis, based on the Longley-Rice signal propagation model, purporting to show "dramatically reduced coverage of Klamath Falls . . . ."[9] UCB asserts that Section 73.313 of the Rules[10] does not bar supplemental showings; in fact, UCB claims, Section 73.313(e) permits them when the terrain in one or more directions from the antenna site departs widely from the average elevation as determined by measurements from 3 to 16 kilometers from the transmitter site along critical radials.[11]

On August 25, 2008, KFSC filed its Opposition and a technical amendment (the "August Amendment") proposing to meet the requirements of Section 73.316(c)(1) without changing the proposed coverage for its new station. KFSC also argues in the Opposition that, using the standard propagation curves in Section 73.313 of the Rules,[12] the Application fully complies with Section 73.515 of the Rules, and therefore, that it is unnecessary of it to use any alternative contour prediction methodology to demonstrate compliance with Section 73.515. It also claims that no Commission rule or policy requires an applicant to provide wholly unobstructed line-of-sight coverage to the community of license and cites to several NCE-FM applications which were granted after the adoption of Section 73.515 where terrain obstacles limited service from the proposed antenna location to the proposed community of license.[13]

In its Reply, UCB argues that Section 73.3522 of the Rules[14] bars KFSC from filing the August Amendment to correct the defective antenna pattern[15] and reiterates its argument that terrain obstructions will "virtually block a 60 dBμ signal from reaching Klamath Falls.[16]

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[5] KFSC's 60 dBμ contour encompasses 42,410 people. KFSC claimed aggregated first and second NCE service to 4,266 people. Thus, the staff found that KFSC would provide combined first and second NCE service to ten percent of the population within its 60 dBμ contour and to more than 2,000 people. *See Comparative Consideration Order,* 23 FCC Rcd at 10220 ¶ 26 and 47 C.F.R. § 73.7002(b).

[6] *Comparative Consideration Order*, 23 FCC Rcd at 10228.

[7] 47 C.F.R. § 73.316(c)(1). UCB argues that KFSC's directional pattern specified a maximum relative field value of 0.9 instead of 1.0 as required by the Rule.

[8] 47 C.F.R. §§ 73.515 and 73.315(b).

[9] Petition at 6 and Engineering Statement of Hatfield and Dawson at Exhibit 5.

[10] 47 C.F.R. § 73.313.

[11] Petition at 6.

[12] 47 C.F.R. § 73.313.

[13] Reply, Engineering Statement at 6-7.

[14] 47 C.F.R. § 73.3522(b).

[15] Reply at 3. UCB argues that Section 73.3522(b) permits amendments as a matter of right only under the following restricted circumstances: (1) during an amendment period announced by Public Notice; (2) by a tentative selectee whose application was returned due to an acceptance defect; (3) to update information supplied in the application; or (4) in response to a Commission request.

Discussion. Pursuant to the Act, petitions to deny must provide properly supported allegations of fact that, if true, would establish a substantial and material question of fact that grant of the application would be *prima facie* inconsistent with Section 309(a) of the Act.[17] We find that UCB has not presented specific factual allegations sufficient to meet this standard.

Directional Antenna. The staff routinely allows NCE window applicants and/or tentative selectees to file minor perfecting amendments, such as the August Amendment correcting the minor relative field value problem here, provided that they do not change an application's comparative status versus other applications in a mutually-exclusive group.[18] In this case, the first and second NCE service population figures in KFSC's original Application, January Amendment and August Amendment, are identical.[19] We therefore will accept the August Amendment.

Community Coverage. UCB alleges that, according to its alternative Longley-Rice contour analysis, the intervening terrain will attenuate the proposed station's signal so that only 1.6% of the population (321 out of 19,462 persons) and only 9.6% of the area within the geographic boundaries of Klamath Falls (4.7 sq. km out of 43.4 sq. km) is predicted to receive 60 dBμ service from the proposed facility.[20] It cites *Christopher D. Imlay*[21] as an example of the staff's dismissal of an NCE application that did not meet the minimum coverage requirements of Section 73.515 where a terrain obstruction between a proposed transmitter site and the proposed license community precluded line-of-sight service to the community.[22] KFSC submits in its Opposition that, applying the standard contour prediction

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[16] *Id.* at 5. UCB argues that "it would be disingenuous . . . to ignore the existence of two intervening mountain peaks, one 1809 meters above mean sea level and the other 1821 meters above mean sea level, that tower 290 meters above [KFSC's] proposed antenna site and 640 meters above Klamath Falls." *Id.*

UCB also argues for the first time in its Reply that the alleged deficient coverage calls into question whether the proposal satisfies Section 307(b) of the Act, because the association of a broadcast station with a community of license is a basic tenet of the Commission's allocation scheme for broadcast stations. Because 47 C.F.R. § 1.45(c) specifies that arguments in replies are to be limited to matters raised in an opposition, we will not consider this argument here.

[17] *See, e.g., WWOR-TV, Inc.,* Memorandum Opinion and Order, 6 FCC Rcd 193, 197 n.10 (1990), *aff'd sub nom. Garden State Broadcasting L.P. v. FCC*, 996 F.2d 386 (D.C. Cir. 1993), *rehearing denied* (Sep. 10, 1993); *Area Christian Television, Inc.*, Memorandum Opinion and Order, 60 RR 2d 862, 864 (1986) (petitions to deny must contain adequate and specific factual allegations sufficient to warrant the relief requested).

[18] *See, e.g., Eagle's Nest Fellowship Church,* Letter, 23 FCC Rcd 862, 866 and n.25 (MB 2008) (tentative selectee's minor amendment to site and technical facilities accepted when proposed amendment did not affect applicant's comparative status); *see also* 47 C.F.R. § 73.7002(c).

[19] *See* August Amendment, Exhibit 1: "The amendment corrects the directional antenna relative field pattern and maximum ERP . . . . As result of the amendment, the coverage achieved by the amended technical facility will be exactly the same as the originally proposed technical facility."

[20] Petition at 6-7.

[21] *Id.* at 5, n.13 (citing *Christopher D. Imlay, Esq.,* Letter, 20 FCC Rcd 11977 (MB 2005) ("*Imlay*").

[22] UCB also attaches four unpublished staff decisions returning applications which did not meet the minimum coverage requirements of Section 73.515 using the standard contour prediction method. These cases are factually distinguishable because, as noted, because the Application complies with Section 73.515 based on standard contour prediction methodology calculations. In any event, we decline to consider these decisions which UCB improperly cites as precedent. *See* 47 C.F.R. § 0.445(e).

methodology specified in the Rules, it will cover 62.1% of Klamath Falls and 61.8% of the population within that community, in full compliance with Section 73.515 and that it need not supply anything further.[23]

UCB's argument is misguided. In *Imlay*, no part of the applicant's proposed 60 dBμ signal reached the community of license, and the published disposition is silent regarding the specific causes of the coverage deficiency.[24] Here, the Application meets the minimum coverage requirements of Section 73.515 using the standard contour prediction method. We have previously held that if an applicant satisfies the 60 dBμ requirements of Section 73.515 using the standard contour prediction method specified in the Rules, a petitioner cannot contest the applicant's showing with an alternate, supplemental showing.[25]

UCB also argues that "numerous FM [allotment] proposals" have been rejected where it was shown that a terrain obstruction between a proposed transmitter site and the proposed license community would preclude line-of-sight to the license community, providing several examples.[26] The cited cases do not support UCB's position. Although several of those cases involved terrain obstruction or shadowing issues, the staff rejected the proposed allotments because the proponent failed to demonstrate that a site was available that would comply with both the 70 dBμ requirements of Section 73.315 and the Commission's spacing rules.[27] In contrast, as we previously found, the Application satisfies the 60 dBμ requirements of Section 73.515 using the standard contour prediction method specified in the Rules.[28]

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[23] Reply, Engineering Statement, at 6 and Exhibit 1.

[24] *See Imlay,* 20 FCC Rcd at 11977 n.3.

[25] *See, e.g., Shaw Communications, Inc.,* Memorandum Opinion and Order, 24 FCC Rcd 5852, 5853 (2009) (Longley-Rice showing not entertained where compliance had been demonstrated by the standard contour prediction method in 47 C.F.R. § 73.313), citing *Letter to Lee Shubert, Esq.,* 10 FCC Rcd 3159, 3160 (MMB 1995).

[26] Petition at 5, n.12 (citing *Cheboygan, Rogers City, Michigan, et al.,* Memorandum Opinion and Order, 18 FCC Rcd 8532 (MB 2004) ("*Cheboygan*"); *Jefferson City*, *Cumberland Gap, Elizabethton, Tennessee, et al.,* Memorandum Opinion and Order, 13 FCC Rcd 2303 (MMB 1998); *Eugene, Oregon,* Report and Order, 10 FCC Rcd 9793 (MMB 1995) ("*Eugene*"); *Wadley and Dadeville, Alabama*, Report and Order, 60 RR 2d 1462 (MMB 1986); *Athens and New Boston, Ohio,* Report and Order, 48 RR 2d 1628 (MMB 1981); and *Attica and Warsaw, New York,* Report and Order, 54 FCC 2d 1137 (1975)).

[27] In *Cheboygan*, the staff found that, due to a terrain obstruction, the proponent had not demonstrated that there was an available site which would comply with Section 73.315 and receive FAA approval.

[28] *Eugene* also illustrates the marked differences in allotment proposal and broadcast application staff review processes which make allocation cases inapplicable in nearly all application cases, in which the applicant proposes a specific transmitter site:

> Ordinarily, there is no need to specify a particular site [in allotment cases], it is only necessary to show that a suitable site area exists. However, in some cases, clarification may be necessary and an additional showing may be required before we can make the [channel] assignment. This was true [in Pinckneyville, Illinois] . . . because of a concern about being able to find a site that met the spacing requirements and which would provide requisite city coverage.

See Eugene, 10 FCC Rcd at 9794*,* citing *Pinckneyville, Illinois,* Report and Order, 41 RR 2d 69, 71-72 (MMB 1977).

Moreover, even were we to consider UCB's supplemental materials, we would reach the same result. Even for commercial stations, line-of-sight is not an absolute requirement.[29] Adequate coverage may still be obtained from a diffracted signal,[30] and the standard propagation methodology relied on in the Application accounts for terrain obstruction effects. Signal attenuation under the standard contour prediction method is based on the average elevation of a radial segment between 3 and 16 kilometers from a station's transmitter site. The standard contour prediction methodology does not assume a uniform terrain throughout the country along each radial, but rather takes into account actual topographic data. As the terrain obstructions cited by UCB fall within this radial segment, the standard contour prediction method incorporates the elevations of the alleged terrain obstructions in computing the average elevation of the radial. That is, in this case the methodology predicts increased signal attenuation in the direction of Klamath Falls, and decreases the distance to the predicted 60 dBμ contour along these radials accordingly.

Conclusion/Actions. For the reasons set forth above, we find that UCB has not raised a substantial and material question of fact calling for further inquiry regarding the KFSC proposal. Additionally, we have examined the amended Application and find that it complies with all pertinent statutory and regulatory requirements and that its grant would further the public interest, convenience, and necessity.

Accordingly, IT IS ORDERED that the "Petition to Dismiss or Deny" filed by UCB USA, Inc., on July 29, 2008, IS DENIED.

IT IS FURTHER ORDERED, that the Application (File No. BNPED-20071022BCL) of Klamath Falls SDA Church for a new noncommercial educational FM station at Klamath Falls, Oregon, IS GRANTED, subject to the condition that Klamath Falls SDA Church must operate technical facilities substantially as proposed for a period of four years of on-air operations.[31]

Sincerely,

Peter H. Doyle
Chief, Audio Division
Media Bureau

cc: Klamath Falls SDA Church
UCB USA, Inc.

[29] *See Rush County Broadcasting Co., Inc.,* Memorandum Opinion and Order, 26 FCC 2d 480 (1970) (line-of-sight to the community is not an absolute requirement); *see also White County Broadcasting*, Hearing Designation Order, 5 FCC Rcd 5642 (1990) (failure to provide line-of-sight does not necessarily imply deficient coverage);

[30] *See Lawrence Bernstein, Esq., and David D. Oxenford, Esq.*, Letter, 24 FCC Rcd 7400, 7403 (MB 2009); *see also Lightning Bug Broadcasting, et al.,* Hearing Designation Order, 5 FCC Rcd 5404 (MMB 1990).

[31] *See* 47 C.F.R. § 73.7002(c).