



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

June 7, 2013

DA 13-1333
In Reply Refer to:
1800B3-CEG
Released: June 7, 2013

Stuart W. Nolan, Jr., Esq.
LegalWorks Apostolate, PLLC
4 Family Life Lane
Front Royal, VA 22630

Ernest T. Sanchez, Esq.
The Sanchez Law Firm P.C.
2300 M Street, NW, Suite 800
Washington, D.C. 20037

Jeffrey D. Southmayd, Esq.
Southmayd & Miller
4 Ocean Ridge Boulevard South
Palm Coast, FL 32137

In re: **WSFI(FM), Antioch, Illinois**
Facility ID No. 175700
File No. BMPED-20120620ABX

**Application for Minor Modification of
Construction Permit**

Informal Objections

Dear Counsel:

We have before us the above-referenced application for a minor modification of the construction permit ("Construction Permit") for noncommercial educational ("NCE") FM Station WSFI(FM), Antioch, Illinois ("Modification Application"), filed by BVM Helping Hands ("BVM"). We also have before us two self-styled "petitions to deny" that we will construe as informal objections:¹ one filed on July 17, 2012, by Chicago Public Media ("CPM") ("CPM Objection")² and one filed on July 25, 2012, by Faith Evangelical Lutheran Church ("FELC") ("FELC Objection") (collectively, the "Informal

¹ Because petitions to deny do not lie against minor modification applications, these pleadings will be considered as informal objections under Section 73.3587 of the rules. See 47 U.S.C. § 309(c) and 47 C.F.R. §§ 73.3584, 73.3587; see also *Revision of Procedures Governing Amendments to FM Table of Allotments and Changes of Community of License in the Radio Broadcast Services*, Report and Order, 21 FCC Rcd 14212, 14220 (2006).

² Prior to its corporate name change, Chicago Public Media was known as The WBEZ Alliance, Inc. For consistency, throughout this letter we refer to the entity as "CPM."

Objections” and “Objectors”), and related pleadings.³ For the reasons set forth below, we deny the Informal Objections and grant the Modification Application.

I. Background.

BVM filed an application for a new NCE FM station at Antioch, Illinois, during the October 2007 NCE filing window (“CP Application”).⁴ On September 2, 2010, BVM was designated as the tentative selectee in NCE MX Group 545.⁵ Thereafter, on December 9, 2010, the Audio Division of the Media Bureau (“Bureau”) granted the CP Application and dismissed CPM’s mutually-exclusive application for a new NCE FM station at Kenosha, Wisconsin (“*Letter Grant*”).⁶ On January 10, 2011, CPM filed a petition for reconsideration of the *Letter Grant*, which the Bureau denied by letter decision on June 13, 2011.⁷ On July 13, 2011, CPM filed an application for review of the *Letter Grant*, which remains pending.

On June 20, 2012, BVM filed the Modification Application, which includes a request for limited waiver of Section 73.509 of the rules to allow otherwise prohibited overlap with NCE Station WBSD(FM), Burlington, Wisconsin.⁸ Such a waiver, allowing an NCE station to receive overlap from second or third adjacent channel stations, is commonly known as a *Raleigh* waiver.⁹ In support of its waiver request, BVM states that it will operate on a third adjacent channel to Station WBSD(FM) and will receive overlap from but not cause overlap to it. BVM also submits that its proposed modification will provide increased service to an additional population of 116, 858 within its 60 dBμ contour, but will result in overlap with a 3.2 square kilometer area containing 2,989 persons.¹⁰

Objectors allege a variety of defects with respect to the Modification Application. Procedurally, Objectors argue that the Modification Application should not be considered at this time because the Construction Permit “lacks the finality necessary for the Commission to process a modification application”¹¹ and it would be “an unjustified waste of Commission resources to allow BVM to pursue a speculative technical proposal . . . when BVM’s original application is still subject to review and may yet be disqualified.”¹² Objectors further contend that the Modification Application is a prohibited contingent

³ On August 6, 2012, BVM filed a Consolidated Opposition to Petitions to Deny (“Opposition”), and on August 17, 2012, CPM filed a Reply (“Reply”).

⁴ File No. BNPED-20071022BJE.

⁵ *Comparative Consideration of 24 Groups of Mutually Exclusive Applications for Permits to Construct New or Modified Noncommercial Educational FM Stations Filed in the October 2007 Filing Window*, Memorandum Opinion and Order, 25 FCC Rcd 12887, 12912 (2010) (“2010 NCE Order”).

⁶ *Ernest T. Sanchez, Esq.*, Letter, Ref. No. 1800B3-KAD (MB Dec. 9, 2010).

⁷ *Ernest T. Sanchez, Esq.*, Letter, Ref. No. 1800B3-MM (MB June 13, 2011).

⁸ 47 C.F.R. § 73.509.

⁹ *See Educational Information Corporation*, Memorandum Opinion and Order, 6 FCC Rcd 2207, 2208 (1991) (“*Raleigh*”).

¹⁰ *See* Modification Application, Exhibit 1, “Sworn Declaration of Stephen Gajdosik and Additional Technical Support of Raleigh Waiver Request” at 2.

¹¹ FELC Objection at 2.

¹² CPM Objection at 3.

application.¹³ Substantively, Objectors argue that BVM's interference showing erroneously uses the "undesired-to-desired" signal strength ratio interference prediction method rather than the required contour overlap method.¹⁴ FELC adds that waiver would also be inappropriate because BVM fails to show that there are no other transmitter sites available that would not cause prohibited overlap. CPM contends that the Modification Application is not grantable because an applicant should not be permitted to "improve its competitive position by a post-filing upgrade."¹⁵ FELC argues that BVM is financially unqualified to build Station WSFI(FM), based on information disclosed in its federal tax forms. CPM adds that BVM's tax forms not only provide *prima facie* evidence of lack of financial qualifications, but also indicate unauthorized control by "mysterious funders" that merits further inquiry by the Commission.¹⁶

BVM maintains that its initial waiver request was technically correct, although it provides a new interference analysis using a 100 dBμ contour rather than a 105 dBμ interference contour out of an "abundance of caution."¹⁷ BVM argues that modifications in this situation are permitted, provided that the applicant does not seek comparative credit for the changes proposed.¹⁸ BVM contends that it was, and remains, financially qualified to construct and operate Station WSFI(FM), and that any allegation to the contrary is unsupported and untimely. Lastly, BVM states that the Modification Application is not "contingent" on the outcome of CPM's application for review because—regardless of the disposition of the application for review—construction must be completed before the Construction Permit expires.¹⁹

In its Reply, CPM largely restates its earlier arguments, adding that BVM is under an ongoing obligation, pursuant to Section 1.65(a) of the Commission's rules, to disclose the loss of the tower site specified in the 2007 CP Application to the Commission.²⁰ BVM's failure to disclose this event, according to CPM, requires not only denial of the Modification Application but also dismissal of the CP Application.²¹

¹³ FELC Objection at 6-7; CPM Objection at 3.

¹⁴ FELC Objection at 4-5; CPM Objection at 2. The Commission replaced the 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, MMB Docket No. 20735, 50 FR 27954, 27960 (1985). The signal strength ratio method identifies the area in which the quality of service is predicted to fall below the minimally acceptable level. The contour overlap method identifies a larger area defined by the 60 dBμ contour of the protected station and interfering contour of the second station. *See* 47 C.F.R. § 73.509(a).

¹⁵ Reply at 8.

¹⁶ Reply at 9-10.

¹⁷ A 105 dBμ contour indicates use of the signal strength ratio interference prediction method, whereas a 100 dBμ contour is used for contour overlap analysis.

¹⁸ Opposition at 6.

¹⁹ Opposition at 7.

²⁰ Reply at 6; 47 C.F.R. § 1.65.

²¹ Reply at 5.

II. Discussion.

Informal objections, like petitions to deny, must allege properly supported facts that, if true, would establish a substantial and material question of fact that grant of the application would be inconsistent with the public interest.²² Objectors have not met this burden.

Procedural issues. *Pending application for review.* Objectors' argument that we cannot consider the Modification Application until action is taken on CPM's application for review—particularly FELC's assertion that BVM's Construction Permit “does not exist at the present time”²³—confuses finality with effectiveness. A Bureau action, such as the grant of the Construction Permit, is effective upon release.²⁴ The Commission may, at its discretion, stay the effectiveness of such action pending review, which it did not do in this case.²⁵ Therefore, the Construction Permit is currently effective—although not final—until it expires. Because, as BVM points out, the “clock is ticking” on the Construction Permit, we will not delay processing the Modification Application to await the outcome of CPR's pending application for review.²⁶

Contingency. Objectors similarly confuse finality and contingency. An application is contingent when it cannot be granted unless and until a second application, also pending before the Commission, is granted.²⁷ Again, a Bureau action is effective, but not final, upon the date of release. Thus, even if we were to consider the CP Application a “second application,” it is no longer “pending” for contingency purposes: it has been granted and is now effective. Therefore, the Modification Application cannot be considered to be contingent on grant of the CP Application, notwithstanding CPR's pending application for review.²⁸

Substantive issues. *Waiver.* The Commission's rules may be waived for good cause shown.²⁹ When an applicant seeks waiver of a rule, it must plead with particularity the facts and circumstances which warrant such action.³⁰ The Commission must give waiver requests “a hard look,” but an applicant for waiver “faces a high hurdle even at the starting gate”³¹ and must support its waiver request with a

²² 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), *reh'g denied* (D.C. Cir. Sept. 10, 1993).

²³ FELC Objection at 7.

²⁴ 47 C.F.R. § 1.102(b)(1).

²⁵ 47 C.F.R. § 1.102(b)(3). Similarly, the Bureau may stay the effectiveness of an action pending reconsideration. 47 C.F.R. § 1.102(b)(2).

²⁶ The grant of the Modification Application is and will remain subject to any action that the Commission takes on the CPM application for review.

²⁷ See, e.g., *1998 Biennial Regulatory Review—Streamlining of Radio Technical Rules in Parts 73 and 74 of the Commission's Rules*, First Report and Order, 14 FCC Rcd 5272, 5280 (1999).

²⁸ 47 C.F.R. § 73.3517.

²⁹ 47 C.F.R. § 1.3.

³⁰ See, e.g., *Spirit Radio of North Florida, Inc. c/o Aaron P. Shainis, Esq.*, Letter, 24 FCC Rcd 2958, 2959 (MB 2009) (“*Spirit Radio*”); *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969) (“*WAIT Radio*”) (subsequent history omitted).

³¹ *WAIT Radio*, 418 F.2d at 1157.

compelling showing.³² Waiver is appropriate only if both (1) special circumstances warrant a deviation from the general rule, and (2) such deviation better serves the public interest.³³

In this case, BVM requests a waiver to allow received overlap of its protected contour with the interfering contour of third-adjacent channel NCE Station WBSD(FM). In *Raleigh*, the Commission first noted that it would be inclined to grant waivers of received overlap from second- or third-adjacent channel stations in circumstances where the benefit of increased NCE service outweighs the potential for interference in small areas.³⁴ Following this approach, we have consistently rejected waiver requests that would receive predicted overlap from co- or first-adjacent channel stations.³⁵ We have also repeatedly rejected proposals that would cause, rather than receive, overlap.³⁶ Granting waivers in these limited circumstances provides flexibility for NCE stations to modify their service areas while protecting existing service from interference. In this case, BVM meets these special criteria and has thus demonstrated that grant of the Modification Application would be in the public interest. Therefore, we grant BVM's waiver request to receive limited overlap from third-adjacent channel NCE Station WBSD(FM).

Although in this case waiver is based primarily on the factors discussed above (second- or third-adjacent channel and received, not caused, overlap) rather than the specific percentage of overlap area versus increased service area, we require, as always, a complete and accurate description of the proposed modification, including the area predicted to receive overlap. We agree with Objectors that the signal strength ratio method is inappropriate in this context, as Section 73.509 of the rules defines an area protected from overlap, not an area based on interference ratio calculations.³⁷ Therefore, a signal strength interference showing does not satisfy the requirement for a waiver applicant to "plead with particularity the facts and circumstances" that would warrant a waiver.³⁸ Accordingly, our analysis in this case is based solely on the contour overlap interference analysis provided by BVM in its subsequent amendment to the Modification Application.³⁹

Financial qualifications. Contrary to FELC's assertions, the Modification Application does not contain—nor is required to contain—a certification regarding BVM's financial qualifications.⁴⁰ Given that we do not require modification applicants to prove their financial qualifications, there is no need for

³² *Greater Media Radio Co., Inc.*, Memorandum Opinion and Order, 15 FCC Rcd 7090 (1999) (citing *Stoner Broadcasting System, Inc.*, Memorandum Opinion and Order, 49 FCC 2d 1011, 1012 (1974)).

³³ *NetworkIP, LLC v. FCC*, 548 F.3d 116, 125-128 (D.C. Cir. 2008) (citing *Northeast Cellular Telephone Co.*, 897 F.2d 1164, 1166 (1990)).

³⁴ *Raleigh*, 6 FCC Rcd at 2208.

³⁵ See *Lakeside Telecommunications, Inc.*, Memorandum Opinion and Order, 20 FCC Rcd 763, 766 (2005) ("*Lakeside Telecommunications*"); *Open Media Corp.*, Memorandum Opinion and Order, 8 FCC Rcd 4070, 4071 (1993).

³⁶ *Spirit Radio*, 24 FCC Rcd at 2960.

³⁷ See 47 C.F.R. § 73.509; see also *Lakeside Telecommunications*, 20 FCC Rcd at 765 n.16.

³⁸ See *Centenary College c/o Mark N. Lipp, Esq.*, Letter, 23 FCC Rcd 17317, 17322, n.36 (2008) (citing *Board of Education of City of Atlanta (WABE-FM)*, Memorandum Opinion and Order, 11 FCC Rcd 7763, 7764 (1996)).

³⁹ Modification Application, Exhibit 1, "Sworn Declaration of Stephen Gajdosik and Additional Technical Support of Raleigh Waiver Request" at 2.

⁴⁰ See *Instructions for FCC 340* at 1 ("Existing stations proposing a minor change on a reserved channel need file only Sections I, II (Items 1, 13, 18, and 19 only), IV, V, VI, and VII.").

further inquiry into this matter. Furthermore, we find CPM's argument regarding unauthorized control, which is based solely on inferences drawn from BVM's alleged lack of financial qualifications, to be purely speculative. Finally, to the extent that FELC objects to BVM's financial qualifications at the time of the 2007 CP Application, it is untimely.⁴¹ Therefore, we do not further consider Objectors' financial qualifications and related arguments here.

*Duty to furnish information under Section 1.65.*⁴² CPM's argument regarding BVM's alleged duty to report the loss of its original tower site relates solely to the 2007 CP Application, not the Modification Application. Therefore this objection, if it lies at all, lies against the CP Application. As such, it appears to be a belated, attempted third bite at the apple: CPM has already filed both a petition for reconsideration and application for review of the grant of the CP Application, and the statutory time limit for additional petitions for reconsideration has passed.⁴³ Because CPM does not allege any reporting violation with respect to BVM's currently-proposed transmitter site in the Modification Application, we will not further consider CPM's Section 1.65 allegations in this context.

Comparative advantage and holding period. As a tentative selectee, BVM has already completed the NCE comparative consideration process. The Commission's rules provide that amendments after the close of the pertinent filing window may potentially diminish, but cannot enhance, an NCE applicant's comparative position.⁴⁴ BVM confirms that it does not seek or expect additional points for the changes proposed in the Modification Application. Since our rules clearly do not permit BVM to retroactively improve its competitive position through a modification at this stage, Objectors' concerns on this point are unfounded. Finally, BVM certifies, in the Modification Application, that the proposed modification satisfies our "holding period" rule by not downgrading service to the area on which its comparative preference was based.⁴⁵

Conclusion/Actions. Based on the above, we find that CPM and FELC have not raised a substantial and material question of fact warranting further inquiry. Accordingly, IT IS ORDERED that the Informal Objections ARE DENIED.

⁴¹ 47 U.S.C. § 405(a) ("A petition for reconsideration must be filed within thirty days from the date upon which public notice is given of the order, decision, report, or action complained of."); 47 C.F.R. § 1.106(f). The date of public notice for an unpublished letter decision is the date appearing on the document: in this case, December 9, 2010. See 47 C.F.R. § 1.4(b)(5).

⁴² 47 C.F.R. § 1.65(a) (providing that whenever the information furnished in a pending application is no longer substantially accurate and complete, the applicant shall promptly amend the application to furnish additional or corrected information).

⁴³ See 47 U.S.C. § 405(a); 47 C.F.R. § 1.106(f).

⁴⁴ 47 C.F.R. § 73.7003(e); *Comparative Consideration of 33 Groups of Mutually-Exclusive Applications for Permits to Construct New or Modified Noncommercial Educational FM Stations*, Memorandum Opinion and Order, 26 FCC Rcd 9058, 9088 (2011).

⁴⁵ Modification Application, Section II, Question 18; see Construction Permit at 3, Condition 7; 47 C.F.R. §§ 73.7002(c), 73.7005(b). BVM's comparative preference was partially based on a fair distribution of service pursuant to 47 U.S.C. § 307(b). 2010 NCE Order, 25 FCC Rcd at 12912.

IT IS FURTHER ORDERED that the waiver of Section 73.509 of the rules IS GRANTED and the application for minor modification of the construction permit for Station WSFI(FM), Antioch, Illinois (File No. BMPED-20120620ABX), IS GRANTED.

Sincerely,

Peter H. Doyle
Chief, Audio Division
Media Bureau