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In Reply Refer to:

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In re: **KMMK(FM), Coggon, Iowa**
Facility ID No. 171762
File No. BMPED-20161205ACL

Informal Objection

Dear Counsel:

We have before us the above-referenced application for a minor modification of the construction permit for noncommercial educational (NCE) station KMMK(FM), Coggon, Iowa (Modification Application), filed by Plus Charities on December 5, 2016. We also have before us: (1) an informal objection (Informal Objection) filed on February 7, 2017, by Kirkwood Community College (Kirkwood)¹; (2) an opposition to the Informal Objection filed by Plus Charities on February 16, 2017 (Opposition); and (3) a reply to the Opposition filed by Kirkwood on February 24, 2017 (Reply). For the reasons set forth below, we deny the Informal Objection and grant the Modification Application.

Background. On March 27, 2015, the Audio Division, Media Bureau (Bureau) issued a new construction permit (Construction Permit) to Plus Charities for an NCE FM station at Coggon, Iowa (KMMK or Station).² On December 5, 2016, Plus Charities filed the Modification Application, seeking to modify the Construction Permit to increase power and specify a new transmitter site. In the Modification Application, Plus Charities requests a limited waiver of Section 73.509 of the Rules³ to allow the Station to receive otherwise prohibited overlap from second-adjacent channel NCE FM stations KXGM, Hiawatha, Iowa, and KCCK-FM, Cedar Rapids, Iowa.⁴

¹ Kirkwood is the licensee of nearby NCE FM station KCCK-FM, Cedar Rapids, Iowa.

² File No. BNPED-20071022BMC; *Broadcast Actions*, Public Notice, Report No. 48458 (Apr. 1, 2015).

³ 47 CFR § 73.509 (Section 73.509).

⁴ See Modification Application, Exh. 18.

Such a waiver, allowing an NCE station to receive—not cause—overlap from second- or third-adjacent channel stations, is commonly known as a *Raleigh* waiver.⁵ In support of its waiver request, Plus Charities states that it will operate on a second-adjacent channel to KXGM and KCKK-FM and will receive but not cause overlap in violation of Section 73.509.⁶ According to Plus Charities, the proposed modification will increase the Station’s coverage area by 13 percent, from 1,826 square kilometers to 2,057 square kilometers, and provide service to an additional population of 173,938 persons within its 60 dBμ contour (a 750 percent increase in population served).⁷ Plus Charities also states that: (1) the proposed area of received overlap from KXGM is 17 square kilometers, or 0.8 percent of the total area served by the proposed facilities; and (2) the proposed area of received overlap from KCKK-FM is 7 square kilometers, or 0.3 percent of the total area served by the proposed facilities.⁸ In these circumstances, Plus Charities concludes, the requirements for a *Raleigh* waiver are met.

In its Informal Objection, Kirkwood cites the Bureau’s decision in *Centenary College* for the proposition that *Raleigh* waivers are limited to existing NCE stations only and are thus unavailable to “new stations such as KMMK.”⁹ Kirkwood restates the basic principle that Section 73.509 is designed both to prevent each NCE station from causing harmful interference to other NCE stations and to ensure interference-free service within each NCE station’s own service contour.¹⁰ Finally, Kirkwood objects that the facilities proposed in the Modification Application would cause interference to some listeners of KCKK-FM outside its protected signal contour.¹¹

In the Opposition, Plus Charities makes a distinction between applicants for new NCE FM stations and permittees whose initial construction permits have been granted, pointing out that the Bureau has granted several *Raleigh* waivers to permittees.¹² Plus Charities also challenges Kirkwood’s engineering conclusions regarding potential interference to KCKK-FM listeners.¹³

In its Reply, Kirkwood contends that although the Bureau has granted *Raleigh* waivers to permittees, it has not “affirmatively contradict[ed]” the holding in *Centenary College* that new stations are ineligible for such waivers.¹⁴ Citing *Centenary College*, Kirkwood argues that the rationale for limiting *Raleigh* waivers to existing stations—e.g., to protect NCE-FM stations from “vast increases in interference levels” and preserve the “continuity of existing service”—equally applies to permittees.¹⁵

⁵ See *Educational Information Corporation*, Memorandum Opinion and Order, 6 FCC Rcd 2207, 2208 (1991) (*Raleigh*).

⁶ Modification Application, Exh. 18, at 1.

⁷ *Id.*

⁸ *Id.*

⁹ Informal Objection at 1-2 (citing *Centenary College*, Letter Decision, 23 FCC Rcd 17317 (MB 2008)) (*Centenary College*).

¹⁰ Informal Objection at 2-3 (citing *Centenary College*, 23 FCC Rcd at 17319).

¹¹ Informal Objection, “Engineering Statement on Behalf of Kirkwood Community College,” at 1.

¹² Opposition at 2.

¹³ Opposition at 3.

¹⁴ Reply at 2.

¹⁵ Reply at 3 (citing *Centenary College*, 23 FCC Rcd at 17320).

Kirkwood explains that its engineering studies may not be acceptable for “interference protection” purposes but are sufficient for “public interest and policy arguments.”¹⁶

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.¹⁷ Kirkwood has not met this burden.

The Commission's rules may be waived for good cause shown.¹⁸ When an applicant seeks waiver of a rule, it must plead with particularity the facts and circumstances which warrant such action.¹⁹ The Commission must give waiver requests “a hard look,” but an applicant for waiver “faces a high hurdle even at the starting gate”²⁰ and must support its waiver request with a compelling showing.²¹ 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.²² The Commission has held that a *Raleigh* waiver is justified where an NCE station seeks to: (1) receive—not cause—overlap from (2) second- or third- adjacent channel stations, and (3) the benefit of increased NCE service heavily outweighs the potential for interference in a very small area.²³ 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, the proposed modification will increase the Station’s coverage area by 13 percent, from 1,826 square kilometers to 2,057 square kilometers, and provide service to an additional population of 173,938 persons within its 60 dB μ contour (a 750 percent increase in population served). The Station’s proposed 60 dB μ contour will receive 17 square kilometers of overlap from KXGM (0.8 percent of the total area served by the proposed facility) and receive 7 square kilometers of overlap from KCCK-FM (0.3 percent of the total area served by the proposed facility). In these circumstances, the benefit of increased NCE service heavily outweighs the potential for interference in the two very small areas of received overlap. Therefore, we conclude that Plus Charities has met the special criteria for a *Raleigh* waiver and has demonstrated that grant of the Modification Application would be in the public interest.

We reject Kirkwood’s argument that Plus Charities is ineligible for a *Raleigh* waiver simply by virtue of its status as a permittee. Neither *Raleigh* nor *Centenary College* are dispositive on this issue, as neither involved an NCE permittee. In *Raleigh*, the waiver requestor was the licensee of an existing NCE FM station, and in *Centenary College*, the waiver requestor was an applicant for a new NCE FM station.

¹⁶ Reply at 3-4.

¹⁷ See, e.g., *WWOR-TV, Inc.*, Memorandum Opinion and Order, 6 FCC Rcd 193, 197 n.10 (1990).

¹⁸ 47 CFR § 1.3.

¹⁹ *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969) (*WAIT Radio*).

²⁰ *WAIT Radio*, 418 F.2d at 1157.

²¹ *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)).

²² *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)).

²³ *Raleigh*, 6 FCC Rcd at 2208. The Commission has delegated authority to the Bureau to waive Section 73.509 when overlap received is 10 percent or less of the proposed service area. *Changes in the Rules Relating to Noncommercial, Educational FM Broadcast Stations*, Memorandum Opinion and Order, 50 FR 27954, 27960 (1985).

In both of those instances, we did not have before us, and thus did not decide, the issue of whether the holder of a construction permit for a new NCE FM station—a permittee—is eligible for a *Raleigh* waiver. In the *Antioch* decision, however, and in other unpublished staff actions, the Bureau has granted *Raleigh* waivers to permittees.²⁴ In accordance with *Antioch* and staff practice, we find that a waiver requestor’s status as a permittee is not an impediment to a *Raleigh* waiver. In making this distinction between permittees and applicants for new stations, we provide permittees “flexibility to respond to the growing demand” for NCE service²⁵ without implicating the administrative and policy concerns raised by allowing an applicant for a new station to include a waiver request in a proposal that has yet to undergo the NCE comparative allocations process.

The remainder of Kirkwood’s arguments, which amount to a plea for interference protection beyond its 60 dB μ contour, are unsupported by rule or precedent and therefore unavailing.²⁶

Conclusion/Actions. Based on the above, we find that Kirkwood has not raised a substantial and material question of fact warranting further inquiry. We find that the facts and circumstances presented are sufficient to establish that grant of the requested waiver would be in the public interest. Accordingly, Plus Charities’ request for waiver of 47 CFR § 73.509, as amended on December 6, 2016, IS HEREBY GRANTED. Furthermore, the application for minor modification of the construction permit for Station KMMK, Coggon, Iowa, File No. BMPED-20161205ACL, IS GRANTED subject to the following conditions:

Further modification of KCKK-FM, Facility ID No. 34954, Cedar Rapids, IA, will not be construed as a per se modification of KMMK's construction permit (BMPED-20161205ACL). *See Educational Information Corporation*, Memorandum Opinion and Order, 6 FCC Rcd 2207 (1991).

Further modification of KXGM(FM), Facility ID No. 85165, Hiawatha, IA, will not be construed as a per se modification of KMMK's construction permit (BMPED-20161205ACL). *See Educational Information Corporation*, Memorandum Opinion and Order, 6 FCC Rcd 2207 (1991).

Sincerely,

Peter H. Doyle
Chief, Audio Division
Media Bureau

²⁴ *Stuart W. Nolan, Jr., Esq.*, Letter Decision, 28 FCC Rcd 11245 (MB 2013) (*Antioch*).

²⁵ *See Raleigh*, 6 FCC Rcd at 2208.

²⁶ *See* 47 CFR § 73.509(a) (establishing the 60 dB μ contour as an NCE FM station’s protected contour). Because we reject Kirkwood’s premise regarding interference protection, we need not also assess its engineering methodology.