

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

In the Matter of)	
)	
Application of State of Oregon, Acting By and)	File No. BP-971212AB
Through the State Board of Higher Education for)	
the Benefit of Southern Oregon University)	
)	
For a New AM Radio Station,)	
Mountain Gate, California)	

MEMORANDUM OPINION AND ORDER

Adopted: August 1, 2000

Released: August 11, 2000

By the Commission:

1. The Commission has before it a Petition for Reconsideration filed November 29, 1999, by the State of Oregon, Acting By and Through the State Board of Higher Education for the Benefit of Southern Oregon University (“Oregon”). Oregon seeks reconsideration of the October 28, 1999, action of the Commission denying Oregon’s application for review of a decision of the Mass Media Bureau returning as unacceptable for filing Oregon’s application for a new AM station at Mountain Gate, California. *Southern Oregon University*, FCC 99-315 (released Oct. 28, 1999) (“*Southern Oregon Order*”).

2. The narrow standards for reconsideration of a Commission denial of an application for review are set forth in 47 C.F.R. §1.106. The Commission will only entertain a petition for reconsideration when the petition relies on facts which: (1) relate to events that have occurred or circumstances which have changed since the last opportunity to present such matters; or (2) were unknown to the petitioner until after his last opportunity to present such matters, which could not, through the exercise of ordinary diligence, have been learned prior to such opportunity. 47 C.F.R. §1.106(b)(2)(i)-(ii). Although Oregon has presented new facts, they do not warrant grant of its Petition for Reconsideration. 47 C.F.R. §1.106(c)(2).

3. **Background.** In December 1997, Oregon filed the captioned application for a new AM station at Mountain Gate, California (the “*Mountain Gate Application*”). At the time it was filed, the application was mutually exclusive with a then-pending application filed by M.C. Allen Productions (“MCAP”), licensee of KMCA(AM), to change its community of license from Burney to Shasta, California.¹ The staff returned Oregon’s Mountain Gate Application as unacceptable for filing because it failed to adequately protect the licensed facilities of KMCA(AM) at Burney, California, as required by 47 C.F.R. § 73.37(a).² The staff denied reconsideration, noting that “Oregon’s redundant petition failed to

¹ See Cutoff Report A-220, released November 14, 1997, listing December 15, 1997, as cut off date for filing competing applications to KMCA’s application to change community of license to Shasta from Burney, CA (FCC File No. BP-970903AA). Oregon’s Mountain Gate Application was filed December 12, 1997, prior to the KMCA cut off date.

² Letter from Dennis Williams, Assistant Chief, Audio Services Division, Mass Media Bureau, to Ernest T. Sanchez, Esq. and Christopher D. Imlay, Esq. (collectively referred to herein as “Counsel”), dated May 1, 1998. (continued....)

contain a curative amendment to eliminate the prohibited overlap” to KMCA’s licensed facilities in Burney.³ In its Application for Review, Oregon argued that §73.37(a) was misapplied with regard to the Mountain Gate Application. In the Application for Review, Oregon stated that the purpose of §73.73(a) is to require that new proposed AM applications not create prohibited levels of interference to already licensed facilities, and noted that it had “no basic quarrel with the purposes of this rule or its general application.”⁴ However, Oregon asserted that in this case, the staff’s reliance on the rule had denied Oregon the opportunity to have its application considered comparatively against KMCA’s proposed new Shasta station. “By this misapplication of 73.37(a) to Oregon’s application, the Commission staff totally eviscerate’s (sic) the requirements of its own rules as well as the requirements of Ashbacker.”⁵ Oregon questioned why the Commission issued a Public Notice on November 14, 1997 inviting competing applications against KMCA’s Shasta proposal if offering technical protection to KMCA’s Burney facilities was proper and intended from the outset.⁶ In the *Southern Oregon Order*, we denied review, concluding that the Mass Media Bureau “properly interpreted §73.37(a) to preclude acceptance of an application that does not protect the contours of an existing facility . . .” We held that this rule applies “even when the licensee of the existing facility has a construction permit, or, as here, has filed an application for a permit, which, if implemented, would eliminate contour overlap between the licensee’s existing facility and the other applicant’s proposed facility.” *Southern Oregon Order* at 1.

4. Oregon asserts its Petition for Reconsideration is based “on facts which relate to events which have occurred” since Oregon filed its Application for Review, and therefore, is not repetitious. Oregon also claims reconsideration is required because the Commission’s adherence to 47 C.F.R. § 73.37(a) is misplaced in the instant case, given the fact that M.C. Allen Productions (“MCAP”) has abandoned its licensed facility in Burney and, according to Oregon, is not going to apply for a license at its new location “until the very last minute.”⁷ Oregon insists MCAP “does not play by the same set of rules” as other typical applicants and thus §73.37(a) should not apply.⁸ It also claims the facts are not as the Commission believed them to be at the time of the *Southern Oregon Order*. Specifically, Oregon claims that MCAP has moved its studio and transmitter site several times since December 1997, most recently to “yet another – unauthorized and undisclosed – location entirely.”⁹ Oregon claims that MCAP has failed to apply for a license for the new Shasta location, and suggests that MCAP is engaged in some sort of “shell game or a game of ‘hide the ball,’ a game in which the licensee continually shifts its location in order to prevent the unwary observer – or regulator – from pinning it down.”¹⁰ Oregon contends that it is apparent
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47 CFR §73.37(a) states: “No application will be accepted for a new station if the proposed operation would involve overlap of signal strength contours with any other station as set forth below in this paragraph . . .”

³ Letter dated May 28, 1998, from Dennis Williams to Counsel.

⁴ Application for Review at 5.

⁵ *Id.* See *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327 (1945) (comparative hearing required when competing applicants file conflicting license or construction permit applications for the same license).

⁶ Application for Review at 5.

⁷ Petition for Reconsideration at 7.

⁸ *Id.* at 6.

⁹ *Id.* at 2.

¹⁰ *Id.* at 5-6.

the *Southern Oregon Order* is “based upon a record which gives the false impression that MCAP has not yet moved its facilities from its so-called ‘existing’ site in Burney, CA.” Oregon states that the “Commission also indicated its lack of knowledge of the current state of affairs when it referred to MCAP as having ‘filed an application for a construction permit, which, *if implemented, would eliminate contour overlap*. . .” (emphasis in original). Oregon claims that the “‘existing facility’ which the staff and Commission are trying to protect no longer exists” because MCAP has initiated operations of the facilities specified in the construction permit that authorized KMCA’s move to Shasta (“*Shasta Construction Permit*”).¹¹ Oregon urges the Commission to conduct an investigation into this matter.

5. **Discussion.** We find that Oregon has not presented any facts that would warrant grant of its Petition for Reconsideration. We have closely reviewed MCAP’s efforts to find a new transmitter site and to license these facility modifications. FCC records establish that MCAP has not operated its licensed Burney station since January 1997 when it requested Special Temporary Authorization (“STA”) to keep KMCA silent. On November 5, 1999 MCAP filed a license application (File No. BL-19991105AAZ) to cover the *Shasta Construction Permit*.¹² However, MCAP almost immediately thereafter encountered zoning problems, and on December 15, 1999 obtained an STA to operate at a different site. On March 24, 2000 MCAP filed an application (File No. BMP-20000324AAT) for construction permit specifying its current STA transmitter site. We fail to see how these unremarkable siting difficulties and associated Commission filings support in any way Oregon’s contention that it should not be required to provide section 73.37(a) protection to the licensed Burney facility.¹³

6. As we stated in the *Southern Oregon Order*, protecting the KMCA license site in Burney “ensures both that the licensed facility can continue to operate in the event [the licensee] cannot implement its construction permit and an orderly transition from grant of the permit to grant of a license for the modified facility.”¹⁴ This “orderly transition” is promoted by the requirement that other applicants continue to protect KMCA’s licensed facilities as MCAP works to secure a new site and a license to broadcast at that location. Thus, consistent with longstanding policy, Oregon’s application for a new AM station was required either to protect KMCA’s licensed facility in Burney, or to request a waiver of section 73.37(a). Oregon did neither, and the staff properly returned the Mountain Gate Application. Moreover, we find that a waiver of section 73.37(a) is particularly unwarranted where, as here, a licensee has experienced difficulties in implementing a facilities modification and is currently operating from a temporary site pursuant to a STA. We also recognize that the application of section 73.37(a) in conjunction with our former AM station new and major change A/B cut-off list procedures may have had the effect of limiting the ability of others to file competing applications when a licensee filed an application to change its station’s city of license. For the reasons stated above, we find that this approach provides important flexibility for licensees to improve facilities and undertake necessary site relocations, and that these considerations outweigh the preclusive impact on proposals that may be favored under Section 307(b) of the Communications Act, as amended. Accordingly, a waiver of Section 73.37(a) in the instant circumstances is unwarranted.

¹¹ *Id.* at 2.

¹² The KMCA application for license to cover the *Shasta Construction Permit* remains pending.

¹³ Oregon’s allegations regarding the location of KMCA’s main studio between December 1997 and the present do not justify the Section 73.37(a) waiver relief it seeks. However, we have referred this potential KMCA rule violation to the Enforcement Bureau for further review.

¹⁴ *Southern Oregon Order* at 2.

7. Accordingly, for the reasons set forth herein, IT IS ORDERED, that the Petition for Reconsideration filed by State of Oregon, State Board of Higher Education, for the Benefit of Southern Oregon University IS DENIED. 47 C.F.R. §1.106(j).

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary