

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In re Application of)	
)	
CALIFORNIA STATE UNIVERSITY, SACRAMENTO)	
)	
For Construction Permit for a New Noncommercial Educational FM Translator Station in Penryn, California)	Facility ID No. 93208 File No. BPFT-19990422TA
)	

MEMORANDUM OPINION AND ORDER

Adopted: March 25, 2003

Released: April 1, 2003

By the Commission:

1. The Commission has under consideration an application for review filed by California State University, Sacramento (“CSU”). CSU seeks review of a staff action denying its petition for reconsideration of the dismissal of its application (the “Application”) to construct a new noncommercial educational (“NCE”) FM translator station at Penryn, California (the “Penryn Translator Station”). For the reasons set forth below, we deny CSU’s application for review.

2. **Background.** Section 74.1204(a) of the Commission’s Rules provides, in pertinent part, that an FM translator application will not be accepted for filing if there would be overlap of the proposed station’s predicted interfering contour with the protected contour of an existing full-service FM station.¹ The Penryn Translator Station’s proposed 100 dB μ interfering contour would overlap the 60 dB μ protected contours of third-adjacent channel stations KZSA(FM), Placerville, California and KXPR(FM), Sacramento, California. CSU is the licensee of KXPR(FM). CSU acknowledged the area of prohibited overlap and submitted letters from KXPR(FM) and KZSA(FM) accepting this overlap.

3. On December 23, 1999, the staff dismissed the Application, holding that the consents of KZSA(FM) and KXPR(FM) to receive the prohibited overlap did not warrant waiver of Section 74.1204.² The staff followed long-standing precedent rejecting attempts of applicants and licensees to determine acceptable levels of interference among broadcast stations.³ The staff also concluded that a waiver was unwarranted.

¹ 47 C.F.R. § 74.1204(a).

² *Letter to California State University Sacramento* (M.M. Bur. Dec. 23, 1999) (“Staff Decision”).

³ See *Notice of Proposed Rule Making and Order in the Matter of 1998 Biennial Regulatory Review – Streamlining of Radio Technical Rules in Parts 73 and 74 of the Commission’s Rules*, 13 FCC Rcd 14849, 14852 (1998); *Educational Information Corporation (WCPE(FM))*, 12 FCC Rcd 6917, 6920-21 (1997); *Board of Education of the City of Atlanta (WABE-FM)*, 11 FCC Rcd 7763- 7766-67 (1996); and *Open Media Corp.*, 8 FCC Rcd 4070 (1993).

4. CSU timely sought reconsideration of the dismissal of the Application. CSU argued that it is arbitrary and capricious to permit the filing of applications for low power FM (“LPFM”) stations that are not required to provide protection to stations operating on third-adjacent channels but not accept CSU’s application for a low-powered FM translator station; CSU stated that adoption of the LPFM rules provided good cause for waiver of Section 74.1204 here.⁴ The staff denied reconsideration on July 10, 2000, finding that the Staff Decision correctly denied the Section 73.1204 waiver request.⁵ The staff also rejected CSU’s proposal to follow the technical approach taken in the *LPFM Report and Order* and eliminate third-adjacent channel requirements for FM translators, noting that this change would be addressed more appropriately in the context of a notice and comment rule making proceeding.

5. In its application for review, CSU claims that the denial of its petition was “plainly erroneous” and should be reversed. CSU also submits that the Staff Decision was arbitrary “as a matter of translator policy and as applied to CSU” and was not based on reasoned decision making.⁶ CSU contends that the staff ruling “makes no attempt” to reconcile the Commission’s determination in the *LPFM Report & Order* not to impose third-adjacent channel protection requirements on 100-watt LPFM stations, with the staff’s dismissal of the Application based on prohibited third-adjacent channel overlap caused by a station that would operate at 6.5 watts effective radiated power. CSU maintains that this inconsistency renders the Commission’s third-adjacent channel translator interference policy unlawful. Second, citing *Melody Music, Inc. v. FCC*,⁷ CSU maintains that its proposed 6.5-watt facility is “similarly situated” to LPFM stations operating at 100 watts and that the two services should therefore be treated alike. CSU asserts the staff made no attempt to justify this “disparate treatment,” and therefore, that the staff action was arbitrary and capricious. Finally, CSU asserts that the staff failed to give CSU’s request to waive Section 74.1204 the “hard look” required by *WAIT Radio v. FCC*.⁸

6. *Discussion.* Rule changes since the filing of the application for review have substantially undermined CSU’s arguments. In April, 2001, at the direction of Congress,⁹ the Commission imposed third-adjacent channel protection restrictions on LPFM stations.¹⁰ These protection standards were derived from the same methodology previously used to establish commercial FM and NCE-FM interference standards, including the overlap standards set forth in Section 74.1204. Thus, LPFM stations are now subject to the same third-adjacent channel protection requirements as FM translator stations, and there is accordingly no need to “reconcile” denial of CSU’s waiver request with LPFM interference standards.

7. We also reject CSU’s claim that LPFM and FM translator services are “similarly situated” and therefore should be licensed on the same technical standards. FM translator and LPFM stations are intended to provide different services, and stations in each class are allowed appropriate facilities in order

⁴ See *In the Matter of Creation of Low Power Radio Service*, 15 FCC Rcd 2205 (2000) (“*LPFM Report and Order*”).

⁵ *Letter to Arter & Hadden, L.L.P.* (M.M.Bur. July 10, 2000).

⁶ CSU cites *Greater Boston Television Corporation v. FCC*, 444 F.2d 841, 851 (D.C. Cir. 1970).

⁷ *Melody Music, Inc. v. FCC*, 345 F.2d 730 (D.C. Cir. 1965).

⁸ *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969).

⁹ See “Making Appropriations for the Government of the District of Columbia for FY 2001,” Pub. L. No. 106-553, 114 Stat. 2762 (2000).

¹⁰ *In the Matter of Creation of a Low Power Radio Service*, 16 FCC Rcd 8029 (2001). See also 47 C.F.R. § 73.807(a)(1).

to meet their respective goals.¹¹ LPFM stations may originate programming¹² and are protected from FM translator interference. In contrast, FM translators are a secondary service intended to supplement the service of existing FM radio broadcast stations. They originate no programming and have no service obligations to their communities of license. FM translators are not protected against interference from 100-watt LPFM stations.¹³

8. Finally, we reject CSU's assertion that the staff failed to give CSU's request to waive Section 74.1204 the "hard look" required by *WAIT Radio v. FCC*. As an initial matter, we note that CSU did not specifically request a "waiver" of any Commission rule in its original application.¹⁴ In any event, however, the Staff Decision clearly considered the justifications proffered by CSU, and concluded that CSU's proposal would not serve the public interest. *WAIT Radio* requires nothing more. Based on the foregoing, we find there is no basis for CSU's contention that the staff ruling was arbitrary and capricious.

9. ACCORDINGLY, IT IS ORDERED, That California State University, Sacramento's August 9, 2000 Application for Review IS HEREBY DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

¹¹ See generally *Review of Technical Parameters for FM Allocation Rules of Part 73*, 2 FCC Rcd 5693 (1987).

¹² LPFM applicants proposing local program origination receive a preference in resolving LPFM application mutual exclusivities. *Id.* at 2259 and 47 C.F.R. § 73.872(b)(3).

¹³ See *Amendment of Part 74 of the FM Commission's Rules Concerning Translator Stations*, 5 FCC Rcd 7212 (1990); see also 47 C.F.R. § 74.1204(a).

¹⁴ It is incumbent upon the applicant to identify specifically any waivers necessary for grant of an application, showing the nature of the waiver or exception desired and setting forth the reasons in support thereof. *Teton Broadcasting Limited Partnership*, 1 FCC Rcd 518, 519 (1986). Additionally, an applicant seeking a rule waiver "must plead with particularity the facts and circumstances which warrant such action and give affirmative reasons to justify grant of the waiver in the public interest." *WAIT Radio v. FCC*, 418 F.2d at 1157.