

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

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| In the Matter of |) | |
| |) | |
| Living Way Ministries, Inc. |) | |
| for a Construction Permit for a New |) | File No. BPFT-19981001TA |
| Noncommercial Educational FM Translator |) | |
| Station on Channel 220 at Sun Valley, California |) | |

MEMORANDUM OPINION AND ORDER

Adopted: October 8, 2008

Released: October 10, 2008

By the Commission:

I. INTRODUCTION

1. In this Memorandum Opinion and Order we deny Petitions for Reconsideration (“Petitions”) filed by the San Bernardino Community College District, licensee of station KVCR(FM) (“KVCR”) and by National Public Radio, Inc. (“NPR”) (collectively “Petitioners”) seeking reconsideration of the Commission’s Memorandum Opinion and Order reinstating the application (the “Application”) of Living Way Ministries, Inc. (“Living Way”) for an FM translator in Sun Valley, California (“*Reinstatement Order*”).¹ Our decision parallels the Commission’s resolution of comparable issues in the *Educational Media Foundation* decision.² We have carefully considered Petitioners’ arguments and find nothing that persuades us to reconsider either the *Reinstatement Order* or *Educational Media Foundation*. We therefore deny the Petitioners’ reconsideration petitions.

¹ *Living Way Ministries, Inc.*, Memorandum Opinion and Order, 17 FCC Rcd 17054 (2002). The KVCR Petition and the NPR Petition were filed on October 15, 2002. Living Way filed a Consolidated Opposition to Petition for Reconsideration on November 8, 2002 (“Consolidated Opposition”). NPR filed a Reply to Opposition to NPR’s Petition for Reconsideration on November 21, 2002 (“NPR Reply”). KVCR filed a Reply to the Consolidated Opposition to Petition for Reconsideration on Nov. 21, 2002, (“KVCR Reply”). The National Association of Broadcasters and the North Carolina Association of Broadcasters filed “Comments” after the deadline for filing Petitions for Reconsideration. The Commission’s Rules make no provision for the filing of comments in proceedings of this kind and we therefore will dismiss the Comments as unauthorized pleadings.

² *Educational Media Foundation*, Memorandum Opinion and Order, 19 FCC Rcd 5843 (2004) (“*Educational Media Foundation*”). The *Educational Media Foundation* Order relied, in part, on the Commission’s *Living Way* Order. *See id.* at 5844.

II. BACKGROUND

A. The Living Way Application

2. The Application³ specified a new translator station operating on a second adjacent channel to, and within the protected 1 mV/m (60 dBu) contour of, Station KUSC-FM, Los Angeles, California.⁴ Pursuant to Section 74.1204(d) of the Commission's Rules⁵ (the "Rules"), Living Way asserted that its application was grantable because the area of predicted interference to KUSC-FM was unpopulated.⁶

3. The staff initially dismissed Living Way's application because its "lack of population" exhibit relied on United States Census Block data which do not accurately reflect the actual location of residences and other structures in an area.⁷ Living Way sought reconsideration of the staff decision, arguing that the Census Block data had been accepted in other contexts. It also provided photographs purporting to show the predicted interference area was unpopulated.⁸ However, one photograph depicted four smokestacks, which the staff deemed indicative of industrial activity, and, accordingly, denied Living Way's reconsideration petition.⁹

B. Living Way's Application for Review

4. Following denial of its Petition for Reconsideration, Living Way filed an Application for Review accompanied by an engineering statement which predicted a smaller interference area.¹⁰ The predicted interference area was smaller because, in the interim, the Commission had relaxed the protection standard for second adjacent channel interference for stations operating in the reserved band.¹¹

³ See File No. BPFT-19981001TA.

⁴ KUSC-FM is licensed to the University of Southern California and serves Los Angeles, California on Channel 218. See File No. BRED-20050729BAU.

⁵ 47 C.F.R. § 74.1204(d).

⁶ 47 C.F.R. § 74.1204(a). Section 74.1204(a) generally prohibits overlap of a translator's predicted F(50,10) interference contour with a full-service FM station's F(50,50), protected service contour. Section 74.1204(d), however, provides exceptions to otherwise prohibited contour overlap. Applicants may qualify for the exception by demonstrating that the overlap area falls over water or that, despite contour overlap, "no actual interference will occur due to intervening terrain, lack of population or such other factors as may be applicable." *Id.*

⁷ See *Letter to Jeffrey D. Southmayd, Esq.*, Ref. No. 1800B3JDB (MMB May 19, 2000).

⁸ Living Way Petition for Reconsideration, filed June 23, 2000.

⁹ See *Letter to Jeffrey D. Southmayd, Esq.*, Ref. No. 1800B3JDB (MMB [undated]).

¹⁰ Application for Review, December 15, 2000.

¹¹ See *id.*, Attachment B at 1, 2. The Commission modified the second adjacent channel protection requirements to conform to the commercial overlap standard set forth in 47 C.F.R. § 73.215. See *1998 Biennial Regulatory Review - Streamlining of Radio Technical Rules in Parts 73 and 74 of the Commission's Rules*, Second Report and Order, 15 FCC Rcd 21649, 21685 (2000) ("*Streamlining Order*"). See also 47 C.F.R. § 74.1204(a). Under the revised standard, the predicted 100 dBu signal strength contour of the proposed reserved band facility may not overlap the predicted 60 dBu signal strength contour of a protected second adjacent channel full-service reserved band authorization or application. See 47 C.F.R. § 73.509. Based on this new and relaxed +40 dB second adjacent channel protection requirement, Living Way estimated that the translator would have an interference area with a 18.4 meter radius from its transmitting antenna. See Application for Review at 5-6, Attachment B at 1-2. That is, the predicted interference area was defined as that where the "undesired" (U) translator signal would exceed the second adjacent channel interference threshold.

As evidence that the predicted interference area was unpopulated, Living Way submitted a United States Geologic Survey (“USGS”) topographic map showing that there were no structures within the predicted interference area.¹²

5. In the *Reinstatement Order*, the Commission accepted Living Way’s demonstration of lack of population in the predicted interference area and reinstated Living Way’s application. As guidance to future translator applicants, the *Reinstatement Order* stated that USGS maps presumptively establish lack of population in an area of predicted interference which applicants may define using the “undesired-to-desired signal ratio method” (“U/D analysis”).¹³

C. Petitions for Reconsideration of the *Reinstatement Order*

6. Petitioners¹⁴ contend that the Commission’s guidance that applicants may employ U/D analysis to show compliance with Section 74.1204(d) is impermissible. KVCR claims the guidance is a “new standard which . . . [the Commission] had previously rejected”;¹⁵ both Petitioners cite decisions and rulemaking orders for the proposition that the threshold values in Section 74.1204(a) apply only at the boundary of a full-service FM station’s protected contour, not within it.¹⁶ NPR also claims that the

¹² See *Reinstatement Order*, 17 FCC Rcd at 17056.

¹³ *Id.* at 17057-17058. (In this item, the term “U/D analysis” is used synonymously with “signal strength ratio methodology.” See *Educational Media Foundation*, *supra* n.2, 19 FCC Rcd at 5843, para. 4.)

¹⁴ KVCR claims that activation of the Living Way translator would have an “immediate impact on listeners of KVCR” because “KVCR operates with a power of 3.8 kW with a directional antenna aimed in the direction of Sun Valley. [Living Way’s] proposed 60 dBu contour is spiked toward the KVCR transmitter site, resulting in a clash of the two signals.” KVCR Petition at 2. KVCR avers that the Commission’s “failure” to consider interference to KVCR should be redressed. *Id.* KVCR’s assertions concerning “spiked” signals and “clashing” interference are unaccompanied by any technical documentation that would allow us to conclude that KVCR would receive interference from the Living Way translator. See *Letter to Hogan and Hartson, LLP*, 13 FCC Rcd 25286 (MMB 1998) (citing *Amendment of Part 74 of the Commission’s Rules Concerning FM Translator Stations*, 5 FCC Rcd 7212 (1990), modified 6 FCC Rcd 2334 (1991), recon. den., 8 FCC Rcd 5093 (1993) (“*Translator Order*”). See also *Board of Education for the City of Atlanta*, Memorandum Opinion and Order, 11 FCC Rcd 7763, 7766 (1996) (“*City of Atlanta*”) (A claim that a station could not be received because of the “interference environment and/or terrain considerations” deemed too “vague and undefined” in light of petitioner’s failure “to specify what standards were used”). These deficiencies make it problematic whether KVCR has standing to contest the Living Way application. However, in the interest of compiling a complete record, we will consider the issues KVCR raises in its petition. In response to Living Way’s contention that NPR lacks standing, see Living Way Opposition at 2, NPR asserts that it is an “interested party” within the meaning thereof in 47 C.F.R. § 1.106(b), and that it has “association (sic) standing” (citing, *inter alia*, *Warth v. Seldin*, 422 U.S. 490, 511 (1975)). See NPR Reply at 2-6 and Exhibit A. We find that NPR has standing, see *infra* para.8, and will consider the issues it raises in its Petition.

¹⁵ KVCR Petition at 3.

¹⁶ NPR contends that if “lack of population” determinations are based on the Section 74.1204(a) thresholds, listeners immediately adjacent to the predicted interference area could have their currently superior interference protection degraded to the minimally acceptable protection afforded listeners at the periphery of the full-service station’s protected contour. See NPR Petition at 9 (citing *City of Atlanta*, 11 FCC Rcd at 7764 n.1). In *City of Atlanta*, the Commission rejected a proposal by two full-service FM licensees to “short space” their stations and accept any resultant interference. The proposal was unacceptable, *inter alia*, because the licensees had not sought waiver of Section 73.509 of the Rules to permit the short-spacing. *Id.* at 7764. In the cited footnote, the Commission observed that contour overlap methodology is distinguishable from U/D analysis because the former defines an area where the “quality of service is predicted to be better than minimally acceptable overall but nonetheless may be diminished for some listeners,” whereas the latter defines an area where signals are at the “minimally acceptable” level. We find the observation correct, but not controlling here. *City of Atlanta* involved potential interference between two full-service FM stations. The instant case involves potential interference from a translator to a full-

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Grandfathered FM Station Order confirms its claim that “the signal strength ratio method does not demonstrate what Section 74.1204 requires -- the absence of harmful interference.”¹⁷ KVCR argues that the Commission’s *Low Power FM Order* discredited U/D analysis.¹⁸ Both Petitioners submit that a non-decisional reference in a Commission order on reconsideration in the *State of Oregon* proceeding¹⁹ establishes that contour overlap analysis is the only methodology accepted by the Commission for “lack of actual interference” determinations in the context of Section 74.1204(d).²⁰ NPR contends that the legislative history²¹ of the 2001 D.C. Appropriations Act²² forbids the Commission to allow applicants to employ U/D analysis in connection with “lack of actual interference” showings pursuant to Section 74.1204(d).²³ It alleges that allowing applicants to use U/D analysis in Section 74.1204(d) showings

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service station. The difference is significant. Section 74.1203 of the Rules provides protection from translator interference to all listeners of full service stations. Thus, if any interference were to occur from Living Way’s translator, the translator would not be permitted to continue to operate unless the interference was remedied. See Section 74.1203(a)-(b) of the Rules. There is no comparable interference-protection rule that applies to short-spaced full-service stations of the kind at issue in *City of Atlanta*. In any event, we note that, subsequent to *City of Atlanta*, the Commission has approved U/D analysis in the context of translators without considering the theoretical possibility that, despite predicted lack of interference, signal quality might be “better than minimally acceptable overall but nonetheless may be diminished for some listeners.” See, e.g., *Association for Community Education*, 19 FCC Rcd 12682, 12687 (2004) (clarifying the use of U/D analysis to demonstrate lack of interference).

¹⁷ NPR Petition at 9 (citing *Grandfathered Short-Spaced FM Stations*, Report and Order, 12 FCC Rcd 11840, 11843 (1997) (“*Grandfathered Short-Spaced FM Order*”). We find NPR’s reliance on the *Grandfathered Short-Spaced FM Order* misplaced. That Order says nothing about Section 74.1204 of the Rules and, in fact, approves the use of U/D analysis - rather than contour overlap - for prediction of interference from short-spaced FM stations. See *id.* at 11843, para. 7. Moreover, the *Grandfathered Short-Spaced FM Order* states that contour overlap methodology “is not effective in controlling interference when prohibited overlap exists.” *Id.* We note that the Living Way translator interference contour and the KUSC service contour overlap in a manner that would be “prohibited” but for the fact that actual interference is limited to an unpopulated area.

¹⁸ See KVCR Petition at 3, n.2 (citing *Creation of a Low Power Radio Service*, Report and Order, 15 FCC Rcd 2204 (sic, 2205), 2230 (2000) (“*Low Power FM Order*”). (Subsequent history omitted.) We disagree with KVCR’s interpretation of the *Low Power FM Order*. There, the Commission chose distance separation as an interference-protection standard for Low Power FM stations only because it deemed distance separation more efficient and less resource-intensive than either contour overlap methodology or U/D analysis. See *id.* at 2233 para. 70. The Commission, therefore, did not “discredit” U/D analysis, it merely found it less efficient than distance separation in a particular, limited, instance, *i.e.*, Low Power FM station allocation.

¹⁹ See KVCR Petition at 3. See also NPR Petition at 6-7 (citing *State of Oregon Acting by and Through the State Board of Higher Education for the Benefit of Southern Oregon State College*, Memorandum Opinion and Order, 16 FCC Rcd 4344 (2001) (“*Oregon Reconsideration Order*”).

²⁰ See NPR Petition at 7; KVCR Petition at 3.

²¹ H.R. Rep. No. 106-567, 106 Cong., 2d. Sess. (“Report 106-567”) at 3. NPR relies on the sentence in the House Report stating: “The bill requires Congressional authority for the FCC to eliminate or reduce any interference standards on the radio dial” and characterizes that statement as a “farther-reaching mandate.” NPR Petition at 13. Taken in context, however, it is clear that the statement applies only to Low Power FM stations and is not, as NPR claims, “farther-reaching.” Report 106-567 deals with, and only with, Low Power FM stations, not FM translators, *i.e.*, the stated “purpose of H.R. 3439 . . . is to modify the FCC rules authorizing the operation of low-power FM stations.” *Id.*

²² Pub. L. No. 106-553, § 632, 114 Stat. 2762, 2762A-111-112 (2000).

²³ See NPR Petition at 13.

“[c]ontravenes a Congressional directive requiring the Commission to maintain existing interference protection.”²⁴

7. NPR also submits that the guidance in the *Reinstatement Order* should be rescinded because the “decision to modify Section 74.1204(d) in the context of an individual translator application” was “arbitrary, capricious, and an abuse of discretion.”²⁵ It contends that the guidance concerning the use of U/D analysis affects the interference protection rights of full-service stations, and, thereby, effectively amends Section 74.1204(d) without the opportunity for notice and comment in violation of the Administrative Procedure Act (“APA”).²⁶

III. DISCUSSION

8. As a preliminary matter we reject Living Way’s challenge to NPR’s standing to seek reconsideration of the *Reinstatement Order*.²⁷ We are satisfied that the documentation submitted by NPR establishes its nexus with potentially affected full-service noncommercial FM member stations and that the cases NPR cites amply support its claim of “association (sic) standing.”²⁸

9. We do not agree with Petitioners that, in adopting Section 74.1204(d), the Commission intended to hold applicants to a rigid “contour overlap standard” to demonstrate lack of actual interference.²⁹ The *Translator Order* specifically disclaims any such “explicit” standard.³⁰ It affords applicants flexibility in demonstrating lack of actual interference³¹ and gives the Commission comparable flexibility in evaluating applicants’ showings.³²

10. The Commission’s intent in adopting Section 74.1204(d) is manifest in the rule’s codification. The first part of the rule sets forth the “over water” exception specifically in terms of contour overlap. The second part of the rule does not mention contour overlap. It states the “lack of actual interference” exception in broader terms, *i.e.*, the effects of terrain on signal attenuation, lack of population and “other factors as may be applicable.”³³ Petitioners contend that this second part of the rule

²⁴ *Id.*

²⁵ *Id.* at 10.

²⁶ 5 U.S.C. § 553. See KVCR Petition at 2-3, NPR Petition at 9-10. *But see para. 21, supra.*

²⁷ See Consolidated Opposition at 2.

²⁸ “NPR may intervene on behalf of any or all of its member stations based on the well-settled principle of ‘association (sic) standing.’” NPR Reply at 3. The Living Way translator is located within the KUSC-FM protected 60 dBu contour, hence the licensee of KUSC-FM would have standing to protest in its own right. Thus, based on the concept of “associational standing,” NPR may participate in this proceeding. See *id.* (citing *e.g., U.S. Telecom Association v. FCC*, 295 F.3d 1326, 1330 (D.C. Cir. 2002)).

²⁹ See KVCR Petition at 2; NPR Petition at 5-9.

³⁰ See *Translator Order*, 5 FCC Rcd at 7230, para. 131, *supra* n.14 (“We believe it is inappropriate and unnecessary to introduce explicit standards for determining whether actual interference exists.”).

³¹ See *id.* at paras. 128-129. (“[The §74.1204 (d) exceptions] will allow the processing staff to take special circumstances into account when they are brought to the staff’s attention. * * * [W]e [will] leave it to applicants to decide the level of analysis they will apply to determine the facilities they will request.”).

³² See *id.* at para. 129. (“We will also not specify a degree of precision for determining contours and predicting interference.”).

³³ 47 C.F.R. § 74.1204(d).

implies that all analyses of terrain, unpopulated areas, and other factors that may establish lack of actual interference, must be based on an area defined by overlap of the protected contour of a full-service station and the interfering contour of a proposed translator. We find no such implication. Had the Commission intended to engraft “in the contour overlap area” to the second part of the rule, it would have done so. As developed below, the absence of a reference to “contour overlap area” in the second part of the rule accurately reflects the Commission’s judgment that an explicit standard for evaluating actual interference was inappropriate and helps effectuate its directive to flexibly consider other factors.

11. NPR’s claim that “Commission decisions have interpreted Subsection 74.1204(d) consistently”³⁴ to require contour overlap analysis in Section 74.1204(d) showings is mistaken in several respects. First, we do not accept NPR’s inference that the Commission deemed U/D analysis unreliable when it “rejected a proposal to define interference in terms of U/D ratios”³⁵ in the rulemaking proceeding that led to the *Translator Order*. In the *Translator Order*, the Commission rejected each of the several proposals for an actual interference definition. It opted instead for a flexible approach, and concluded “it is inappropriate and unnecessary to introduce explicit standards for determining whether actual interference exists.”³⁶

12. Second, NPR’s out-of-context quote from the *Channel 6 Order* – “these [U/D] ratios are not valid at the higher field strengths close to the transmitter”³⁷ – fails to support its claim that U/D analysis is an inherently unreliable methodology for predicting interference between FM stations. The Commission’s statement was made in the context of an “application [that] severely violates the requirement,” *i.e.*, only when a Channel 6 station “approaches the existing NCE-FM transmitter site.”³⁸ However, the Commission also stated that “under normal circumstances,” the U/D analysis thresholds provide adequate protection against objectionable interference.³⁹ In any event, NPR’s and KVCR’s reliance on the *Channel 6 Order* is misplaced because the Commission specifically rejected applying the *Channel 6 Order* interference criteria to FM translators.⁴⁰

³⁴ See NPR Petition at 6.

³⁵ *Id.* at 8.

³⁶ *Translator Order*, 5 FCC Rcd at 7230, para. 131, *supra* n.14. The rulemaking proposal involved defining actual interference in terms of a translator exceeding -20 dB below the measured 10 μ V/m signal of a full service station. It would have required the Commission to define full-service stations’ contours by field strength measurements instead of the contour prediction method specified in 47 C.F.R. § 73.333 and a revision of the full-service station protected contour values in § 74.1204(b)(1-2). See *City of Atlanta*, 11 FCC Rcd at 7767 n.3. (“[Field strength measurements] generally are not a reliable means of locating a particular protected or interfering contour.”).

³⁷ NPR Petition at 8-9 (citing *Changes in the Rules Relating To Noncommercial, Educational FM Broadcast Stations*, Memorandum Opinion and Order, 58 RR 2d 629, 639, para. 56 (1985)) (“*Channel 6 Order*”). KVCR makes the same claim. KVCR Petition at 3-4.

³⁸ *Channel 6 Order*, 58 RR 2d at 639 (emphasis added). We also note that, twenty-five years later, and with benefit of experience with “hundreds of applications based on lack of population within a U/D ratio method-predicted interference area” the Commission said the “severe violation” circumstance posited in the 1985 *Translator Order* was unlikely and, in any event, failed to establish that U/D analysis is “technically flawed” *per se*. See *Educational Media Foundation*, 19 FCC Rcd at 5845, paras. 5-6, 8 (citing *Grandfathered Short-Spaced FM Order*, 12 FCC Rcd at 11843, para. 7, and 47 C.F.R. § 73.213(a)).

³⁹ See *Channel 6 Order*, 58 RR 2d at 639.

⁴⁰ It found that the strict non-interference provisions of 47 C.F.R. § 74.1203 adequately protect a Channel 6 station in the unlikely event it receives interference from an FM translator. There is no comparable strict non-interference rule governing interference to Channel 6 reception from full-service FM stations. See *Channel 6 Order*, 56 RR 2d at 629, n.6.

13. Furthermore, we cannot reconcile Petitioners' claim that the *Grandfathered Short-Spaced FM Order* invalidated U/D analysis with the fact that, in that Order, the Commission not only sanctioned U/D analysis, it actually required the affected applicants to use U/D analysis when estimating potential interference and codified that requirement in Section 73.213(a) of the Rules.⁴¹

14. We also remain unpersuaded by Petitioners' argument that the *Oregon Decision* and the *Oregon Reconsideration Order* establish that actual interference must be defined using contour overlap analysis. In large part, Petitioners rest their arguments on the following statement in the *Oregon Reconsideration Order*:

We pointed out in our earlier decision [the *Oregon Decision*] that the staff has consistently held that the term "lack of population" as used in § 74.1204(d), means no population in the overlapping coverage area between a full-service station and the translator station seeking a waiver of § 74.1204(a).⁴²

The underlined text is inaccurate. In fact, the *Oregon Decision* says nothing about the staff holding – “consistently” or otherwise – that an applicant must demonstrate lack of population in “the overlapping coverage area between a full-service station and the translator station.”⁴³ Rather, the quoted statement is mere *dicta* that lacks decisional significance. The Commission dismissed the petition on procedural grounds as repetitious. Later in its Order, the Commission discussed a matter neither essential nor even relevant to the dismissal, *i.e.*, the petitioner's mischaracterization of the reasons why the Commission ruled against it in the underlying *Oregon Decision*.⁴⁴ Thus, we find unavailing Petitioners' argument that

⁴¹ See 47 C.F.R. § 73.213(a)(1)(i) (specifying, *inter alia*, that “[c]o-channel interference is predicted to exist . . . at all locations [within the normally protected contour] where the undesired . . . F(50,10) field strength exceeds a value 20 dB below the desired . . . F(50,50) field strength of the [protected] station.”). See also *Educational Media Foundation*, 19 FCC Rcd at 5845 (citing *Grandfathered Short-Spaced FM Order*, 12 FCC Rcd at 11843). Petitioners' contention that U/D analysis is inherently unreliable is further undercut by the exception to prohibited contour overlap contained in the rules governing LPTV stations and TV translators and boosters. For example, 47 C.F.R. §74.705(e) allows applicants to demonstrate lack of actual interference, despite contour overlap, based on “Longley-Rice terrain-dependent propagation prediction methods.”

⁴² *Oregon Reconsideration Order*, 16 FCC Rcd at 4345, para. 5, *supra* n.17 (emphasis added) (citing *State of Oregon, Translator Station K202AP*, Memorandum Opinion and Order, 15 FCC Rcd 11842, 11844 (2000) (“*Oregon Decision*”). See NPR Petition at 6-7, NPR Reply at 7-8, KVCR Petition at 3.

⁴³ The only reference to consistent staff practice contained in the *Oregon Decision* is: “The staff has consistently held that ‘lack of population’ means no population, not merely low or negligible population.” *Oregon Decision*, 15 FCC Rcd at 11844 (emphasis in original). Contrary to the inaccurate statement in the *Oregon Reconsideration Order*, *supra*, para. 14, the Commission in the *Oregon Decision* did not say “no population in the overlapping coverage area.”

⁴⁴ The mention of staff practice arose, only incidentally, when - after declining to address the petition on the merits - the Commission took the opportunity to correct two instances of petitioner's mischaracterizing the Commission's reasoning underlying the *Oregon Decision*, only one of which is relevant here, *i.e.*, the petitioner's allegation “that we [the Commission] arbitrarily created the ‘impossible’ requirement that a waiver applicant prove lack of population under § 74.1204(d).” The Commission countered this mischaracterization - that applicants were required “to prove a negative” - by citing two unreported actions whereby the staff accepted the use of topographic maps to establish lack of population in an overlap area. We note that the acceptance of “no interference” showings in a contour overlap area does not imply that we would not accept showings limited to areas of predicted interference, as in the case of the Living Way translator, defined using U/D analysis. See *Association for Community Education, Inc.*, 19 FCC Rcd at 12687, *supra* n.16. (“In a recent decision, we addressed and approved the staff's practice of permitting translator applicants to use the “undesired-to-desired” (“U/D”) signal strength ratio methodology to demonstrate lack of interference in the context of Section 74.1204(d) (footnote omitted). The same method may also be used to demonstrate the potential for interference under 74.1204(f).” *Id.* (citing *Living Way Ministries*, 17

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an erroneous characterization of the interference standard in the *Oregon Reconsideration Order* establishes that actual interference determinations must be based on contour overlap.⁴⁵

15. Turning to the *Oregon Decision* itself, we believe Petitioners read the order too narrowly when they conclude that contour overlap analysis is the only suitable means of establishing lack of actual interference. The only explicit holding in the *Oregon Decision* is that there is no *de minimis* exception to the “lack of population” provision in Section 74.1204(d), *i.e.*, that the rule literally means what it says - no population whatsoever. We do not see how that holding can be construed to be either an endorsement or rejection of any particular means of defining a predicted interference area.

16. It is significant, however, that in the *Oregon Decision*, the Commission considered (but ultimately rejected) the applicant’s attempt to demonstrate that, despite contour overlap, the translator did not cause “actual interference” within the meaning of Section 74.1204(d).⁴⁶ Thus, after the Commission rejected the applicant’s argument about a *de minimis* exception to the “no population” provision of Section 74.1204(d), it went on to say that the applicant did not show “any other factors that would warrant an exception under §74.1204(d).”⁴⁷ The *Oregon Decision* thus indicates that even if the protected contour of a full-service station and a translator overlap, the Commission will consider demonstrations of lack of actual interference based on “other factors.”⁴⁸

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FCC Rcd 17054, 17056 (2002) (when demonstrating that “no actual interference will occur due to . . . other factors” pursuant to Section 74.1204(d), an applicant may use the U/D ratio method”).

⁴⁵ Non-decisional statements in orders dismissing pleadings on procedural grounds are *dicta* which lack binding effect. *See, e.g., Massachusetts Community Antenna Television*, Memorandum Opinion, Declaratory Ruling and Order, 2 FCC Rcd 7321 (1987), where the Commission rejected as precedent, statements made in a District Court Order that dismissed a party for lack of standing. It found that “any substantive pronouncements in that Order are merely *dicta*, and have no precedential value in the matter before us.” *Id.* at 7321. *Cf. Bokunewicz v. Purolator Products, Inc.*, 907 F.2d 1396, 1399 (3rd Cir. 1990) (holding that, in any Order, “everything after denial of jurisdiction” is “*dicta*, pure and simple.”). The suitability of contour overlap analysis vs. U/D analysis was not before the Commission in the *Oregon Reconsideration Order*. As the D.C. Circuit has noted, “our experience as judges [is] that unless an issue is squarely presented in a case, any discussion of the question in the opinion (*dicta*) is only a preliminary view and therefore not to be given precedential weight.” *Time Warner Entertainment Co. v. FCC*, 144 F.3d 75, 79 (D.C. Cir. 1998).

⁴⁶ The applicant’s translator had operated for some time pursuant to Special Temporary Authority and the applicant submitted an affidavit from its Director of Broadcasting stating he had neither received interference complaints nor encountered interference during his “field inspections.” The Commission reviewed the affidavit but found it so inadequate that “we are unable to make a determination as to lack of actual interference based on a conclusory statement such as this.” *Oregon Decision*, 15 FCC Rcd at 11844-11845. The applicant could have prevailed had it submitted a competent affidavit from a *bona fide* listener of the station showing lack of actual interference. *Cf. Association for Community Education*, 19 FCC Rcd at 12688, *supra* n.16 (rejecting claim of interference from translator based on station engineer’s statement that his car radio experienced interference at specific sites within full-service station’s protected contour).

⁴⁷ *Oregon Decision*, 15 FCC Rcd at 11884.

⁴⁸ An applicant, however, bears the burden of establishing lack of actual interference. The Commission will dismiss the application when an applicant has not met its pleading burden under Section 74.1204(d), *e.g.*, as it did in the *Oregon Decision*. *Id.* at 11885.

17. Finally, even if we assumed, *arguendo*, that the *Oregon Reconsideration Order* had correctly described “consistent” staff practice at the time, we could not infer from that fact that the staff is foreclosed from drawing on its experience and expertise to refine its practices or that it is bound to any particular technical “standard” when doing so. In the *Translator Order*, the Commission explicitly declined to adopt a standard for evaluating actual interference pursuant to Section 74.1204(d).⁴⁹ Moreover, refinement of staff practices is fully consistent with *Translator Order*’s directive that the staff should be flexible⁵⁰ in evaluating applications that invoke Section 74.1204(d).⁵¹ Thus, refinements in staff practice not only are permissible, they advance the “significant Commission goals” articulated in *Educational Media Foundation, i.e.*, “providing translator applicants with site selection flexibility and preventing translator interference to full-service FM facilities.”⁵² Importantly, this flexible approach to translator licensing is backstopped by the requirement that a translator station must cease operation if it causes actual interference to any authorized broadcast station and the translator station cannot promptly eliminate this interference.⁵³

18. NPR is plainly wrong in claiming that the legislative history⁵⁴ of the 2001 *D.C. Appropriations Act*⁵⁵ prevents the Commission from relying on U/D analysis in support of showings of lack of actual interference. The legislation, by its very terms, applies only to the Low Power FM (“LPFM”) Radio service.⁵⁶ NPR’s attempt to show otherwise by reliance on legislative history is contrary to long-standing precedent establishing that parties may not rely on legislative history when a statute is clear and unambiguous.⁵⁷ Moreover, when it enacted the LPFM Rules, the Commission clearly said they “do not apply to full-service stations and FM translators.”⁵⁸

⁴⁹ See *Translator Order*, 5 FCC Rcd at 7230, para. 131, *supra* n.14.

⁵⁰ *Id.* at 7229-7230, paras. 128, 131.

⁵¹ *Oregon Decision*, 15 FCC Rcd at 11844. See *Reinstatement Order*, 17 FCC Rcd at 17057, *supra* n.1. (U/D analysis appropriately used to demonstrate that the Living Way translator would exceed the Section 74.1204(a) second adjacent channel interference criterion only in an unpopulated area within an approximate twenty-meter radius of the translator’s antenna); See also *Educational Media Foundation*, 19 FCC Rcd at 5846, para 8, n.7 (approving U/D analysis that showed that the Section 74.1204(a) threshold was exceeded only in a 2.6 meter radius from the translator antenna, and describing U/D analysis as “a useful and reliable tool for determining areas where actual interference is likely to occur.”).

⁵² *Educational Media Foundation*, 19 FCC Rcd at 5846, *supra* n.2.

⁵³ See 47 C.F.R. § 74.1203(b)-(c).

⁵⁴ H.R. Rep. No. 106-567, 106 Cong., 2d. Sess. 153-154. See also nn. 21-23, *supra*, and accompanying text.

⁵⁵ Pub. L. No. 106-553, § 632, 114 Stat. 2762, 2762A-111-112 (2000).

⁵⁶ The legislation provides that “[t]he Federal Communications Commission shall modify the rules authorizing the operation of low-power FM radio stations, as proposed in MM Docket No. 99-25 . . .” Pub. L. No. 106-553, § 632, 114 Stat. 2762, 2762A-111-112 (2000).

⁵⁷ See, e.g., *Implementation of Section 309(j) of the Communications Act - Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses. Reexamination of the Policy Statement on Comparative Broadcast Hearings*, First Report and Order, 13 FCC Rcd 15920, 15932 (1998) (“It is a well-established principle of statutory construction that when congressional intent, as reflected in the statutory language, is clear ‘that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress,’”) (citing *Chevron U.S.A. v. Natural Res. Def. Council*, 467 U.S. 837, 842-43 (1985)). See also *Landreth Timber Co. v. Landreth*, 471 U.S. 681, 685 (1985) (“It is axiomatic that ‘[t]he starting point in every case involving construction of a statute is the language itself.’”) (citations omitted).

⁵⁸ *Low Power FM Order*, 15 FCC Rcd at 2234 (2000).

19. KVCR also claims that the *Reinstatement Order* unjustifiably relied on the *Streamlining Order* when it supposedly established a “new standard” – U/D analysis – for Section 74.1204(d) showings.⁵⁹ First, as NPR agrees,⁶⁰ it is clear from the context of the *Reinstatement Order*, that the term “new standard” refers to the *Streamlining Order*’s change in the second adjacent channel interference standard – and not to the Commission’s guidance on permissive use of topographic maps and U/D analysis. Second, as developed in this decision, the guidance in the *Reinstatement Order* rested not on the *Streamlining Order* – which is silent on the “other factors” that may demonstrate lack of actual interference – but on the earlier *Translator Order*’s provisions mandating a flexible approach in the evaluation of Section 74.1204(d) showings and the lack of any “explicit” standard for such evaluations.⁶¹

20. NPR’s argument that the *Reinstatement Order* impermissibly relied on “two staff decisions” as authority “to contravene Commission rules, case precedent and policy” to establish Section 74.1204(d) standards is without merit.⁶² The “two staff decisions” cited in the *Reinstatement Order* merely illustrate instances in which U/D analysis has been employed to confirm lack of “actual interference” pursuant to Section 74.1204(d). The authority underlying the *Reinstatement Order* resides in the *Translator Order*, not the two staff decisions.

21. Petitioners are incorrect in claiming that the *Reinstatement Order* impermissibly “amended” Section 74.1204(d) in violation of the APA.⁶³ The permissive guidance and clarification in the *Reinstatement Order* are consistent with the flexibility inherent in Section 74.1204(d), the Commission’s rejection of an “explicit standard”⁶⁴ in the *Translator Order*, and the protection provided to other broadcast stations against translator station interference by Section 74.1203 of the Rules. As the D.C. Circuit has held, an agency action does not become a rule amendment “merely because it supplies crisper and more detailed lines than the authority being interpreted.”⁶⁵

⁵⁹ See KVCR Petition at 2, KVCR Reply at 2.

⁶⁰ See NPR Reply at 9 (“[T]he Technical Streamlining Order merely reconciled a prior difference between the reserved FM and non-reserved FM spectrum with regard to the minimum distance separation between second adjacent channels.”).

⁶¹ See nn.49-50, *supra*, and accompanying text.

⁶² NPR Petition at 7-8 n.18 (citing *Reinstatement Order*, 17 FCC Rcd at 17056, para. 5, *supra* n. 1). The staff decisions cited are *Letter to Christine J. Newcomb, Esq.*, New FM Translator, Ref. No. 1800B3-BHW (MMB April 26, 2001) and *Letter to John Garziglia, Esq.*, Manahawkin, N.J., Ref. No. 1800B3-JDB (MMB Sept. 26, 1966).

⁶³ See *supra* para. 7.

⁶⁴ See *supra* para. 9.

⁶⁵ *American Mining Congress, et al. vs. Mine Safety and Health Administration et al.*, 995 F.2d 1106, 1112 (D.C. Cir. 1993). See also *Cost-Based Terminating Compensation for CMRS Providers; Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Calling Party Pays Service Offering in the Commercial Mobile Radio Services*, Order, 18 FCC Rcd 18441, 18450, at para. 22 (2003):

The D.C. Circuit has repeatedly held that interpretive rulings are properly used to clarify the original meaning and application of an agency’s substantive rules. The Supreme Court in reaffirming the authority of agencies to interpret their own rules stated that ‘a new APA rulemaking is required only if an agency adopt[s] a new position inconsistent with any of the [agency’s] existing regulations.’” As discussed previously, the clarifications are fully consistent with our rules. Thus, [this item] is not subject to APA notice and comment requirements. (citations omitted.)

IV. CONCLUSION

22. Petitioners have not substantiated their contention that U/D analysis is inherently defective or that it has been repudiated by the Commission as a reliable means of determining actual interference. It has been relied upon, indeed required, in multiple other contexts, including in the rules governing short-spaced commercial FM stations and television translators.⁶⁶ As noted in *Educational Media Foundation*, the Commission's reliance on U/D analysis in evaluating Section 74.1204(d) showings has been validated by the interference-free operation of literally hundreds of translators authorized on that basis.⁶⁷ Should actual interference occur from a translator authorized based on a U/D analysis, full-service stations are fully protected by the strict non-interference provisions of Section 74.1203(d) of the Commission's Rules.⁶⁸ Few stations have encountered the need to invoke the Rule's protection.⁶⁹ In rejecting Petitioners' strait-jacket interpretation of Section 74.1204(d), we meet our statutory mandate to "encourage the larger and more effective use of radio in the public interest."⁷⁰ We thus will continue to exercise the flexibility conferred by the *Translator Order* and direct the staff to authorize translator stations when doing so will not compromise the rights of full-service stations against actual translator interference. We are therefore denying Petitioners' reconsideration petitions.

V. ORDERING CLAUSES

23. Accordingly, IT IS ORDERED that the Petitions for Reconsideration filed by National Public Radio and San Bernardino Community College District ARE DENIED. IT IS FURTHER ORDERED that the Comments of the National Association of Broadcasters and the Comments of the North Carolina Association of Broadcasters ARE DISMISSED as unauthorized pleadings.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

⁶⁶ See 47 C.F.R. § 73.213(a); *Grandfathered Short-Spaced FM Order*, 12 FCC Rcd at 11843, *supra* n.15. See also, e.g., *State of Florida*, Order, 22 FCC Rcd 1782, 1784 (PSHSB, 2007). See also 47 C.F.R. §§ 22.657, 22.970, 73.183, and 80.467; *Third Periodic Review of the Commission's Rules and Policies Affecting the Conversion to Digital Television*, Notice of Proposed Rulemaking, 22 FCC Rcd 9478, 9520, para. 102 (2007). ("Applicants for analog TV translator and low power TV ("LPTV") stations must propose facilities that do not exceed specified threshold U/D ratios at a DTV station's noise-limited contour or at all points within the noise-limited area in the case of adjacent channel stations proposing to locate inside the DTV noise-limited contour.")

⁶⁷ See *Educational Media Foundation*, 19 FCC Rcd at 5845, *supra* n.2.

⁶⁸ Interfering translators must discontinue operation within three minutes following notification by the Commission that actual interference is occurring. See 47 C.F.R. § 74.1203(e).

⁶⁹ In instances in which actual interference has occurred, the Media Bureau has cancelled FM translator authorizations. See *Creation of a Low Power Radio Service*, Second Order on Reconsideration and Further Notice of Proposed Rulemaking, 20 FCC Rcd 6763, 6779 (2005), *Erratum*, 20 FCC Rcd 8717 (2005).

⁷⁰ 47 U.S.C. § 303(g).