

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

In the Matter of)
)
Amendment of Section 73.202(b),)
Table of Allotments,)
FM Broadcast Stations.)
(Columbia, Missouri))

**MEMORANDUM OPINION AND ORDER
(Proceeding Terminated)**

Adopted: June 11, 2014

Released: June 12, 2014

By the Commission:

1. The Commission has before it a June 21, 2006, Application for Review filed by The Curators of the University of Missouri ("Petitioner") directed to the staff *Memorandum Opinion and Order* in this proceeding.¹ No other pleadings were received. For the reasons discussed below, we grant the Application for Review in part and deny it in part.

2. *Background.* On September 30, 2003, the Commission issued a *Public Notice*,² announcing that parties could petition to reserve certain vacant allotments in the nonreserved FM band for noncommercial educational ("NCE") use pursuant to Section 73.202(a)(1)(ii) of the Commission's rules.⁴ Under the relaxed reservation standard, a nonreserved FM channel could be reserved if: (1) the proponent could demonstrate that it is technically precluded from using a reserved channel;⁵ and (2) the proposed facility would provide a first and/or second NCE radio service to at least ten percent of the population within the 1 mV/m contour of its proposed station, provided that such service is to at least 2,000 persons.⁶ On March 24, 2004, Petitioner submitted a timely rulemaking petition (the "Petition") to reserve vacant Channel 252C2 at Columbia, Missouri,⁷ for NCE use. Although its proposal would provide a second NCE service to 22,095 persons, that total comprised only approximately seven percent

¹ *Columbia, Missouri*, Memorandum Opinion and Order, 21 FCC Rcd 5832 (MB 2006) ("MO&O").

² *Public Notice*, 18 FCC Rcd 19600 (MB 2003) ("Public Notice").

³ The nonreserved FM band consists of FM Channels 221 to 300. See 47 C.F.R. § 73.202(a). The nonreserved FM band can be used by both NCE and commercial stations.

⁴ 47 C.F.R. § 73.202(a)(1)(ii).

⁵ FM channels 201 to 220 have been reserved for NCE use. See 47 C.F.R. § 73.501(a).

⁶ See *Reexamination of the Comparative Standard for Noncommercial Educational Applicants*, Report and Order, 15 FCC Rcd 7386, 7434-35 (2000) ("NCE R&O") and Second Report and Order, 18 FCC Rcd 6691, 6702-6703 (2003) ("Second NCE R&O").

⁷ Channel 252C2 had been formerly licensed to Contemporary Broadcasting, Inc., but that license was revoked in 1998 due to a felony conviction by its principal shareholder Michael Rice and misrepresentation and lack of candor by the licensee. See *Contemporary Media, Inc.*, 13 FCC Rcd 14,437 (1998), *aff'd Contemporary Media, Inc. v. FCC*, 214 F.3d 187 (D.C. Cir. 2000), *certiorari denied*, 532 U.S. 920 (2001). On July 24, 2001, five parties, including the Petitioner, filed applications to operate Channel 252C2 on an interim basis, but those applications were dismissed. See *Media Bureau Announces Dismissal of Unamended Form 301, 314, and 315 AM and FM Applications*, Public Notice, 20 FCC Rcd 1611 (MB 2005).

of the population within the proposed station's service contour. Consequently, Petitioner requested a waiver of the ten percent reservation criterion. It argued that a waiver was warranted because: (i) the proposed NCE station would provide a valuable second NCE service to "nearly" ten percent of the population within the service area; (ii) none of the nonreserved channels in Columbia, Missouri, were allotted to NCE stations; (iii) no reserved band channels were available with which to establish a new NCE station in Columbia; and (iv) the ten percent threshold effectively barred NCE stations from using nonreserved spectrum in a manner that was consistent with Commission policy.

3. The Bureau initially returned the Petition because it did not meet the ten percent channel reservation threshold; the Bureau did not otherwise address Petitioner's waiver request.⁸ Thereafter, Petitioner filed a Petition for Reconsideration, arguing that the *Bureau Letter* failed to afford the waiver request a "hard look" as required by *WAIT Radio v. FCC*.⁹ In the *MO&O*, the Bureau concluded that Petitioner had failed to show that a waiver was warranted because the proposal fell "well below" the ten percent standard and because waiver of the standard "would, in effect, preclude any interested party from now participating in an FM auction for commercial Channel 252C at Columbia."¹⁰

4. In its Application for Review, Petitioner reiterates its contention that the *MO&O*'s perfunctory denial of the waiver request failed to satisfy the "hard look" required by *WAIT Radio*.¹¹ The Petitioner claims that the Bureau's analysis consisted solely of conclusory statements and failed to consider the potential public interest benefits of the waiver request. Accordingly, Petitioner argues that the Commission should consider Petitioner's waiver request *de novo*.¹² It asserts that there is "good cause" for the waiver because Columbia, Missouri, has been deprived of any service on Channel 252C2 since October 3, 2001.¹³ Petitioner alleges that in any FM auction, an entity either associated with or including former operator Michael Rice could make the highest bid, leading to years of litigation as other applicants challenge the entity's character qualifications. Petitioner contends that licensing an NCE station on Channel 252C2 would ameliorate this multi-year loss of service, but that such a result is only possible if the Commission waives the ten percent requirement.¹⁴

5. Petitioner also argues that a waiver serves the public interest better than strict adherence to the reservation standard. It maintains that the grant of a waiver would serve the Commission's overall public interest objectives by providing a new NCE service to over 300,000 people and a second NCE service to over 22,000, which is approximately 11 times the minimum population threshold of 2,000 that the Commission has concluded would justify an allotment's reservation. Petitioner contends that the Bureau did not articulate any justification for the rigid application of the ten percent requirement, has not explained how it arrived at the ten percent test, and has not addressed its contention that the reservation standard is extraordinarily difficult to satisfy, especially for a Class C2 station operating in a larger market.¹⁵

⁸ *Letter to Kathryn R. Schmeltzer, Esq.* (MB Mar. 18, 2004) ("*Bureau Letter*").

⁹ 418 F.2d 1153, 1157 (D.C. Cir. 1969) (requiring an agency to give a "hard look" to waiver requests to determine whether or not deviation from a general rule is warranted) ("*WAIT Radio*").

¹⁰ *MO&O*, 21 FCC Rcd at 5833.

¹¹ Application for Review at 7, citing *WAIT Radio*, 418 F. 2d at 1157.

¹² Application for Review at 8.

¹³ See *Michael S. Rice*, Memorandum Opinion and Order, 16 FCC Rcd 18394 (2001) (ordering Rice-controlled stations, including KFMZ(FM), Columbia, Missouri, which operated on Channel 252, to cease operations no later than October 3, 2001). *Id.* at 19397.

¹⁴ Application for Review at 9-10.

¹⁵ *Id.* at 11-12.

6. *Discussion.* As a threshold matter, we believe that the Bureau erred below by failing to give Petitioner's waiver request the "hard look" mandated by *WAIT Radio*. We therefore will grant the Application for Review to that extent. However, we have carefully examined Petitioner's waiver request here and conclude that that it should be denied for several reasons.

7. It is well settled that the Commission may waive its policies or rules upon a showing of good cause. It also may exercise its discretion to waive a policy or rule where the particular facts make strict compliance inconsistent with the public interest.¹⁶ In addition, the Commission may take into account considerations of hardship, equity, or more effective implementation of overall policy on an individual basis.¹⁷ However, waiver of the Commission's policies or rules is appropriate only if both: (i) special circumstances warrant a deviation from the general rule; and (ii) such deviation will serve the public interest.¹⁸

8. In the *NCE R&O* the Commission adopted the ten percent/2000 person threshold for both awarding a dispositive "fair distribution" preference for applicants proposing operation on spectrum reserved for NCE use¹⁹ and for reserving non-reserved spectrum for NCE use.²⁰ The Commission recognized that "there might not be a large number of cases" that could meet the "relatively high threshold" for a preference.²¹ That same threshold, of course, also restricts the reservation of spectrum in the latter context which the Commission characterized as a "limited expansion of existing policy."²²

9. The Commission previously addressed the issue of waiving the ten percent criterion in the context of applying the "fair distribution" preference.²³ The petitioner in that case, as here, argued that the number of persons receiving a first or second service justified a waiver of this criterion. In denying the waiver request, the Commission noted therein that this argument "reflects a misunderstanding of the NCE Section 307(b) eligibility standard," in which both the 10 percent threshold and the 2,000 person minimum were important, holding that:

These two components work in tandem to make the standard meaningful regardless of community size. In well-populated service areas such as [the applicant's], the ten percent component ensures that Section 307(b) eligibility is limited to NCE applicants offering new service to a significant portion of the relatively large population. In contrast, the 2,000 person component is designed for small communities to ensure that trivial service differences are not treated as dispositive. It would be neither "odd" nor "anomalous" for an applicant in a populated

¹⁶ *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) ("*Northeast Cellular*").

¹⁷ *WAIT Radio*, 418 F.2d at 1159; *Northeast Cellular*, 897 F.2d at 1166.

¹⁸ *NetworkIP, LLC v. FCC*, 548 F.3d 116, 125-128 (D.C. Cir. 2008); *Northeast Cellular*, 897 F.2d at 1166.

¹⁹ *NCE R&O*, 15 FCC Rcd at 7396-99.

²⁰ *Id.* at 7434-35.

²¹ *Id.* at 7397.

²² *Id.* at 7434.

²³ *Comparative Consideration of 76 Groups of Mutually Exclusive Applications for Permits to Construct New or Modified Noncommercial Educational FM Stations*, 22 FCC Rcd 6101, 6114 ¶ 30 (2007) (rejecting waiver of threshold for preference where proposed station would provide a first or second service to almost 25,000 persons but only 9.33 percent of the population within the proposed service contour) ("*76 NCE Groups MO&O*"). See also *Holy Family Communications, Inc.*, Memorandum Opinion and Order, 26 FCC Rcd 12791 (MB 2011), *rev. denied*, Memorandum Opinion and Order, 28 FCC Rcd 4854 (2013) (rejecting waiver of threshold for preference where proposed station would provide a second NCE service to 9.46 percent of the population within its proposed service contour), *appeal docketed sub nom. Mary V. Harris Foundation v. FCC*, Case No. 13-1304 (D.C. Cir. Dec. 13, 2013).

area to propose first and second service to a population well in excess of 2,000 yet fail to qualify for a Section 307(b) preference because it falls short of the ten percent benchmark.²⁴

10. Moreover, we find that the licensing circumstances which Petitioner faces are not exceptional. Petitioner's inability to satisfy the ten percent threshold is principally related to the fact that Columbia and the surrounding area is served by numerous NCE FM stations. Specifically, four NCE FM stations are currently licensed to Columbia, Missouri.²⁵ 13 other NCE FM stations provide some level of NCE service to the 288,383 persons located within the allotment's predicted service area.²⁶ Thus, the circumstances present here, reflected in Petitioner's failure to meet the ten percent threshold, suggest that there is not a strong need for an additional NCE station in this market. Furthermore, while we agree with Petitioner that the ten percent standard is difficult to satisfy, we disagree that it is generally extraordinarily difficult to do so, especially for a Class C2 station. In response to the *Public Notice*, the Bureau received 129 petitions for 91 of approximately 500 allotments available for NCE reservation. This process resulted in the NCE reservation of 55 allotments,²⁷ more than ten percent of the universe of allotments at issue and almost exactly proportional to the ten percent of FM channels set aside exclusively for NCE FM use.²⁸ This includes four Class C2 allotments.²⁹ Additionally, we have reserved several allotments that will serve more than 200,000 persons in larger metro areas.³⁰ As such, contrary to Petitioner's contention, we find that the relaxed reservation standard fairly balances the competing demand for commercial and NCE service and for balancing the needs of rural and urban listeners.

11. We also reject Petitioner's assertion that waiver of the reservation standard is justified because of the unique history of Channel 252C2 at Columbia and the need to expedite the restoration of service. Broadcast competitive bidding procedures have proven extremely effective in expeditiously granting construction permits and promoting the prompt introduction of new broadcast services. Indeed,

²⁴ 76 NCE Groups MO&O, 22 FCC Rcd at 6114.

²⁵ Stations KBIA(FM), Channel 217C1, KCOU(FM), Channel 201A, KOPN(FM), Channel 208C2, and KWWC-FM, Channel 213A, are licensed to Columbia. Petitioner is the licensee of Stations KBIA(FM) and KCOU(FM). See File Nos. BLED-959 and BLED-20100129ADO, respectively.

²⁶ These stations are KBKC(FM), Channel 211A, Moberly, KJLU(FM), Channel 205C2, Jefferson City, KMCV(FM), Channel 210C3, High Point, KNLG(FM), Channel 212A, New Bloomfield, KCVK(FM), Channel *299A, Otterville, KJAB-FM, Channel 202A, Mexico, KAUD(FM), Channel 213A, Mexico, and KJIR(FM), Channel 219C2, Hannibal, MO.

²⁷ In contrast, the Bureau denied 35 NCE reservation petitions, of which only 18 proposals were rejected for failure to comply with the ten percent criterion of Section 73.202(a)(1)(ii). To this end, the proposals failed to provide ten percent coverage to the proposed area because two or more NCE stations already provided coverage to the proposed area.

²⁸ To further accommodate NCE rulemaking proponents, the Bureau extended the use of terrain-based engineering studies to calculate first and second NCE service. See *Hemet, California*, Report and Order, 22 FCC Rcd 19296 (MB 2007). In this regard, we uphold the staff practice of permitting the use of terrain-based engineering studies to meet the ten percent threshold requirement. However, a staff engineering analysis of the Petitioner's proposal has determined that this methodology would not be decisional in this case, increasing 2nd NCE service coverage to only 8.1 percent, still well short of the ten percent threshold.

²⁹ The four C2 allotments reserved for NCE use pursuant to the procedures established in the *Public Notice* are Channel *270C2, Olathe, Colorado, Channel *289C2, Golden Meadow, Louisiana, Channel *248C2, Denver City, Texas and Channel *232C2, Hayward, Wisconsin. See *Olathe, Colorado*, Report and Order, 19 FCC Rcd 13115 (MB 2004); *Golden Meadow, Louisiana*, Report and Order, 19 FCC Rcd 13852 (MB 2004); and *Denver City, Texas and Hayward, Wisconsin*, Report and Order, 19 FCC Rcd 15418 (MB 2004).

³⁰ The NCE reserved allotments are Channel *261C3, Anniston, Alabama, Channel *238A, Westley, California, Channel *298B, Terre Haute, Indiana, and Channel *221A, Amherst, New York. See *Anniston, Alabama and Westley, California*, Report and Order, 19 FCC Rcd 13115 (MB 2004); *Terre Haute, Indiana*, Report and Order, 19 FCC Rcd 13852 (MB 2004); and *Amherst, New York*, Report and Order, 19 FCC Rcd 14607 (MB 2004).

two of the former Michael Rice-controlled stations have been auctioned and are now authorized.³¹ Finally, we reject, as speculative, Petitioner's argument that the Commission should reserve the allotment to avoid the potential of protracted litigation over Michael Rice's qualifications.

12. *Conclusion/Actions.* As discussed above, we find that, although the Bureau failed to afford proper consideration to Petitioner's request for waiver of the Commission's channel-reservation standards, Petitioner has not demonstrated special circumstances or a public interest benefit that would justify such waiver.

13. Accordingly, IT IS ORDERED, that, pursuant to Section 5(c)(5) of the Communications Act of 1934, as amended,³² and Section 1.115(g) of the Commission's rules,³³ the Application for Review filed by The Curators of the University of Missouri IS GRANTED to the extent indicated herein and IS DENIED in all other respects.

14. IT IS FURTHER ORDERED that this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

³¹ Channel 270, Eldon, Missouri, and Channel 271A, Cuba, Missouri, previously licensed to entities controlled by Michael Rice, were included in FM Broadcast Auction No. 62, which closed on January 31, 2006. Zimmer Radio of Mid-Missouri, Inc. is now the licensee for the Eldon allotment, Station KZWV(FM) (Facility ID No. 165951), and Broadcast Management, Inc. is the licensee for the Cuba allotment, KQXQ(FM) (Facility ID No. 165955). See File Nos. BLH-20061002AXD and BLH-20110307ABL, respectively.

³² 47 U.S.C. § 155(c)(5).

³³ 47 C.F.R. § 1.115(g).