

F.C.C. 69-1174

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of
CLARIFICATION OF SUBPARTS B AND C OF PART
73 OF THE COMMISSION'S RULES AND REGULATIONS (NONCOMMERCIAL EDUCATIONAL
FM STATIONS OPERATING ON UNRESERVED
FM CHANNELS)
Request by WBAL-FM, Inc., for Declaratory Ruling

MEMORANDUM OPINION AND ORDER

(Adopted October 29, 1969)

BY THE COMMISSION: COMMISSIONER BARTLEY DISSENTING.

1. The Commission has under consideration a "Request for Declaratory Ruling" filed on October 10, 1969, by WBAL-FM, Inc., licensee of FM station WBAL, New York City, a noncommercial educational station operating on channel 258, which is an unreserved or commercial channel. The request concerns the question of whether such stations, noncommercial educational in character even though they operate on unreserved channels, are governed by the provisions of subpart B of part 73 of the Commission's rules section 73.201 et seq., which relate to commercial FM stations, or by the provisions of subpart C of that part, sections 73.501 et seq., governing noncommercial educational FM stations. WBAL was cited for violation of three of the sections of the commercial rules—section 73.282 concerning program logging, section 73.287 concerning station identification, and section 73.254 concerning annual equipment performance measurements—and it claims that these citations were in error since it is governed instead by the educational FM rules, specifically sections 73.582, 73.587, and 73.554, which it did not violate. It seeks a declaratory ruling to this effect, to remove uncertainty (Administrative Procedure Act, sec. 554(d)). There are 18 such noncommercial educational FM stations on unreserved or commercial FM channels.

2. We recognize that, as to stations such as WBAL, the rules at present are ambiguous as to whether the regular commercial FM rules or the noncommercial educational FM rules apply. Therefore, it is not appropriate to impose any penalty on WBAL-FM, Inc. or its parent Pacifica Foundation, in connection with the matters discussed herein, and none will be imposed.¹ To remove the uncertainty for the

¹ The citation to WBAL included a number of matters. The statement that no penalty will be imposed relates only to those involved in the "Request for Declaratory Ruling" and discussed here, i.e., situations where WBAL would not have been in violation if the educational FM rules, rather than the commercial FM rules, are regarded as applicable.

future, we are amending subpart C as set forth herein below. As to the basic merits of the three situations—which set of rules should apply—the conclusions discussed below appear appropriate and are embodied in the rule amendment herein.

3. *Program logging.*—With respect to program logging, it is clear that the noncommercial educational FM rules should apply, since the character of these stations' programing is completely different from that of commercial AM, FM, and TV stations, even though they operate on unreserved or commercial FM channels, and is the same as the much more numerous FM stations on reserved channels. The provisions of section 73.582 are much simpler than those of the corresponding commercial station rule, 73.282, and are geared to the much smaller amount of information which noncommercial educational stations are required to furnish with initial and renewal applications (they use FCC forms 340 and 342 instead of forms 301 and 303).² Therefore it is appropriate that section 73.582 should apply instead of 73.282, and the rule adopted herein so provides.

4. *Station identification.*—The rules concerning required station identification—sections 73.287 and 73.587—are much the same in their requirements, the difference being that the former, governing commercial stations, permits an ID not to be given on schedule only where certain types of material would be interrupted ("single speech, play," etc.) while the educational rule permits postponement of an ID when it would interrupt "a single continuous program of longer duration than 30 minutes." WBAI claims that the rules recognize a valid distinction in this respect between commercial and educational operations, and that the latter present many types of programs which do not fall within the types listed in the commercial rule as permitting ID postponement but which nonetheless would suffer from a required interruption.³

5. The justification for applying the educational rather than the commercial rule in this case is less clear than in the matter of program logging mentioned above. However, the ID rules for all of the aural services—which are now unduly complex and in part obsolescent—are in the process of revision in docket 18243. Pending this revision, it does not appear appropriate to require stations such as WBAI to meet the more stringent requirements of the commercial rule. Accordingly, the rule amendment adopted herein makes the educational rule applicable for the time being.

6. *Annual equipment performance measurements.*—Section 73.254, for commercial FM stations, provides that stations shall make equipment performance measurements of their transmitters at least annually (audio frequency response, audio frequency harmonic distortion, and AM and FM output noise levels); they shall keep the records of such

² Apart from other violations of sec. 73.282 not involved here, the citation stated that "WBAI's program logs failed to show program classifications as required by that rule for the programs of commercial stations." Sec. 73.582, for educational FM stations, does not contain this requirement.

³ It appears from the citation and WBAI's response that an ID was not made where it would have interrupted a discussion program. This would not fall within the "single speech" exception of sec. 73.282, but it would come within the "single continuous program" exception of sec. 73.587.

measurements for 2 years. WBAI was cited for several violations of this rule. Its position is that, while it has made such measurements at times in the past, it is not required to do so because of the nonapplicability of this rule. The corresponding educational FM rule, section 73.554, contains certain specifications for transmitter performance but does not require performance measurements.

7. We are of the view that in this situation the regular commercial rule should, and does, apply to stations such as WBAI. In general, equipment performance measurements are necessary in order to insure proper station operation, and there is no reason why these stations should be any less subject to equipment performance measurement requirements than commercial stations operating in the same band. In fact, WBAI-FM does not urge that this requirement is not generally a good thing; its argument is simply that noncommercial educational FM stations on reserved channels are not required to do this, that (subscription-supported as it is) WBAI-FM is no more able to bear the expense involved than they are, and that whatever the reasons are for exempting such stations, they apply equally to WBAI.

8. We are of the view that educational FM stations generally—other than low-power 10-w. stations—should no longer be exempt from this requirement, and in a notice of proposed rulemaking adopted today we propose to make them subject to it. For the period in the meantime, we hold that such stations on unreserved or commercial channels are subject to the commercial rule, section 73.254, since the operations do not differ technically in any respect from commercial stations on these channels. We point out that, on the other hand, there are some differences between the situations of stations such as WBAI and those of educational FM stations on the 20 reserved channels (channels 201-220), even those which are not 10 watters. Many of the educational stations on the reserved channels, other than 10 watters, operate with relatively small facilities, effective radiated power of less than 1 kw., and low antenna height, whereas WBAI operates with 5.40 kw., E.R.P. and antenna height above average terrain of 1,220 feet, the maximum permitted for a high-power (class B) facility in the New York City area under present rules. Therefore, technically improper operation is a matter of significance over a much greater distance than is the case with a typical FM facility on a reserved channel.

9. *Conclusions and rule amendment.*—For the reasons discussed above, we conclude that stations such as WBAI—noncommercial educational stations operating on unreserved or commercial channels—are subject to the educational FM rules in subpart C of part 73, rather than the commercial FM rules in subpart B of that part, in most respects including program logging and station identification. However, they are subject to the provisions of subpart B with respect to assignment and classification rules (secs. 72.201-73.213), and the requirements concerning transmitters, performance and measurements (sec. 73.254), rather than the corresponding educational FM rules. We are accordingly adopting a new section concerning such stations,

section 73.506, making this explicit.⁴ Since this is declaratory, clarifying and interpretative in nature, notice and prior proceedings are not required under the Administrative Procedure Act (5 U.S.C. 553).

10. In view of the foregoing, *It is ordered*, That, pursuant to authority contained in sections 4(i) and 303 of the Communications Act of 1934, as amended, subpart C of part 73 of the Commission's rules *Is amended* by adding the following new section 73.506, effective December 12, 1969:

§ 73.506 Noncommercial educational broadcast stations operating on unreserved channels.

Non commercial educational FM stations which operate on channels listed in § 73.202 rather than § 73.501, but which comply with § 73.503 as to licensing requirements and the nature of the service rendered, shall comply with the provisions of the following sections of Subpart B of this Part: 73.201 through 73.213 (Classification of FM Broadcast Stations and Allocation of Frequencies); § 73.254 (Required Transmitter Performance); and such other sections of Subpart B as are made specifically applicable by the provisions of this Subpart C. In all other respects such stations shall be governed by the provisions of this subpart and not Subpart B.

11. *It is further ordered*, That the "Request for Declaratory Ruling" filed on October 10, 1968, by WBAI-FM, Inc., *Is granted* to the extent indicated hereinabove, and in all other respects *Is denied*.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary*.

⁴ It should be emphasized that this provision of the rules will apply only to stations on these channels which are truly noncommercial educational, those complying with the provisions of sec. 73.503 concerning the nature and character of the service rendered. New sec. 73.506 so states. It does not apply to other stations even though their service may be largely noncommercial in character; they are subject to the regular commercial rules in subpart B.